113

H.R. 2443; THE EQUITABLE ESCHEATMENT ACT OF 1993

HEARING

BEFORE THE

SUBCOMMITTEE ON
FINANCIAL INSTITUTIONS SUPERVISION,
REGULATION AND DEPOSIT INSURANCE

OF THE

COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

MARCH 22, 1994

Printed for the use of the Committee on Banking, Finance and Urban Affairs

Serial No. 103–128

U.S. GOVERNMENT PRINTING OFFICE
77–606 CC WASHINGTON : 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-044545-0

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H.R. 2443, THE EQUITABLE ESCHEATMENT ACT OF 1993

TUESDAY, MARCH 22, 1994

House of Representatives,
Subcommittee on Financial Institutions
Supervision, Regulation and Deposit Insurance,
Committee on Banking, Finance and Urban Affairs,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2128, Rayburn House Office Building, Hon. Stephen L. Neal [chairman of the subcommittee] presiding.

Present: Chairman Neal, Representatives LaFalce, Schumer, Frank, Kennedy, Flake, Orton, Waters, Klein, Maloney, Nussle, Thomas, Johnson, Linder, Lazio, Bachus, and Huffington.

Also present: Representative Castle.

Chairman Neal. I would like to call the subcommittee to order at this time.

Today, the subcommittee examines H.R. 2443, the Equitable Escheatment Act of 1993. We have a number of distinguished witnesses before us and have a lot to cover today. Therefore, I would like to limit the opening statements as much as we possibly can. I would like to limit them to a brief statement by me and maybe the ranking minority Member. If anyone else feels strongly about it, I will recognize them for that purpose. But we do have a lot to do.

The bill before us, H.R. 2443, addresses the situation that develops when banks and other financial intermediaries are unable to distribute dividends, interest, and other security distributions which they hold as record owner because they cannot determine the identity of the actual or beneficial owner. Such intermediaries retain custody of such distributions until expiration of a period specified by State law when they become escheatable to the State.

The issue before us is which States should receive these distributions. The inability to distribute interest or dividend payments to owners occurs in about 0.02 percent of all distributions; but because of the size of the securities industry, it has been estimated this amounts to approximately $100 to $150 million a year.

Currently, New York, Delaware, and Massachusetts, which have large intermediaries incorporated in their States, recover almost all of such unclaimed funds. As I understand it, New York alone has received approximately $1 billion in unclaimed securities distributions since 1972.

This issue was recently before the Supreme Court. In its opinion of last spring, in *Delaware* v. *New York*, the Supreme Court ruled prior precedent requires such owner-unknown interest and dividends held by banks and other financial intermediaries to escheat to the State of incorporation of the financial intermediary holding the funds. However, in its opinion, the Supreme Court invited the States to seek action by Congress if it wished to change this distribution—excuse me, if they wished to change this distribution rule.

H.R. 2443 is the result of this invitation. The legislation distributes owner-unknown dividends on securities held by a bank or other financial intermediary to the State in which the issuer of such securities, whether corporate or municipal, maintains its principal executive office, thereby returning unclaimed funds to the jurisdiction in which the issuer actually ran its business and generated the funds.

This rule of escheatment would apply to the $100 to $150 million of escheatable funds estimated per year of all 50 States and the District of Columbia. The bill would also apply to the funds in controversy in the *Delaware* v. *New York* case requiring such funds—roughly $1 billion since 1972—to be escheated to the States of the issuers' principal executive office.

Sponsors of this bill estimate that the reallocation would distribute approximately $200 to $250 million to New York, $11 million to Delaware, $12 million to Massachusetts and $725 to $775 million to the remaining States and the District of Columbia.

H.R. 2443 currently has 326 cosponsors, including 22 of the Financial Institutions Subcommittee's 30 members and 39 of the 51 members of the full committee.

On the Senate side, Senator Hutchison has introduced similar legislation, S. 1715, which now has 77 cosponsors. H.R. 2443 is supported by 47 States and the District of Columbia.

This bill has engendered much contentious debate. Strong opinions have been presented on each side. There is also much confusion as to the facts surrounding this very technical issue.

The subcommittee is holding this hearing to get all of these facts out on the table so that we may make an informed, careful decision on this legislation and make any necessary modifications to the bill in order to ensure the bill is fair. To this end, I have worked with members on both sides of the aisle to structure this hearing to be as fair as possible to both sides.

Let me just also state that I am troubled by the fact that so many owner-unknown securities distributions are being escheated in the first place. I don't understand how very sophisticated financial intermediaries lose track of the owners of millions of dollars each year. It is my hope this hearing will shed light on this issue so in the end we can correct the situation and give such funds back to the person entitled to them.

I understand this issue is still in litigation. I request both the members of the subcommittee as well as the witnesses to keep to the subject at hand; namely, the issue of unclaimed securities distributions in general and the pros and cons of H.R. 2443 and not spend time on specific actions or litigants involved in the case.

As I said before, we have a number of very distinguished witnesses today. After we hear from our ranking member and others who feel very strongly about this, we will begin with Representative Chuck Schumer of New York, a member of this subcommittee, and Senator Kay Bailey Hutchison of Texas.

I would like to yield at this time to Mr. LaFalce.

Mr. LAFALCE. May I proceed out of order?

Chairman NEAL. Mr. LaFalce has a meeting at the White House and has asked to proceed. I would like to ask unanimous consent he be allowed to proceed at this time.

Mr. LAFALCE. Thank you very much, Mr. Chairman. I also thank the members of the subcommittee for the unanimous consent.

The President is having a forum shortly on small business and health care. I have been asked to participate with the Small Business Committee. In no way should that lead anyone to think this issue before us today, the issue of escheatment, is not uppermost in my mind. I cannot think of any more important issue before the Banking Committee right now than the issue of escheatment. It is one I will be working on diligently with the subcommittee Chair and all the other members every day. It is a highly technical and complex issue.

I just want to make a few brief points, and then I would like to have the entirety of my statement put in the record.

The first point I want to make is the Gonzalez bill attempts to do something that is not just arguably unconstitutional, it is absolutely unconstitutional. It attempts to give retroactive application to monies that already have been taken and spent. It goes back and constitutes an unjust taking. I know of no court that could conceivably uphold a retroactive application of this legislation. That is where the overwhelming bulk of the money would be.

Second, a lot of individuals do not distinguish between primary rules and secondary rules with respect to the escheatment. The bill does not deal with the most common type of funds subject to escheatment. The vast majority of cases, there is a last-known address for the lost stockholder or bondholder. In those cases, the primary rule applies, and those abandoned funds are escheated to the State of the customer's last known address, thereby spreading the abandoned funds amongst the many—50 States.

This fact is worth repeating: In the vast majority of cases, unclaimed funds are already being distributed to the 50 States. The SEC estimates that every year unclaimed dividends distributed to the States under the primary rule are in the range of $10 billion.

If the primary rule is not applicable, if there is no known last address to unclaimed funds, then the secondary rule applies. Here you are not talking about $10 billion. Here you are talking about approximately $100 million per year.

The secondary rule is the one that is subject to the Gonzalez legislation. It applies only when the beneficial owner cannot be identified. This category comes about due to small but systemic record keeping errors in the wholesale securities business which leads to uncollected dividends and interest payments that are actually owed to brokers, banks, and their large institutional customers.

Comparing the $10 billion in funds already distributed to the States with the $100 a year to the financial intermediary puts the issue, I believe, in much better perspective.

Also, we should point out this: Claims for escheated funds would go in both directions. With New York, Delaware, and Massachusetts under the Gonzalez bill, maybe claims on other States as well as other States making claims on those three, insufficient attention has been given to the fact the legislation would allow for such a two-way street.

In addition, let me say that there should be no embarrassment or shame involved in the fact that New York and Delaware are benefiting from the fact that many banks and securities firms are located within their borders. It is as legitimate as other States' benefits from the industries that tend to be concentrated in those States—examples being the oil and gas industry, the automobile industry, the aerospace industry.

If this bill is legitimate, if this bill is pursued, why not pursue a nationwide redistribution of severance taxes collected in the oil patch States over the last three decades? Congress should not be in the business of redistributing lawfully collected revenues from one State to the other. The legislation is misguided and based upon serious misinformation.

I thank the Chairman.

[The prepared statement of Mr. LaFalce can be found in the appendix.]

Chairman NEAL. I thank the gentleman.

Let me say I know that New York, Massachusetts, Delaware Representatives feel very strongly about this issue. I would like to point out for the record that all of them have contacted me and have made their arguments forcefully, and are working diligently on behalf of their States.

I would also point out, though, that if we do not start hearing from witnesses reasonably soon, we are not going to get through this testimony.

Governor Richards needs to leave by 11. She is an important witness. She is on the next panel. We will hear many of the arguments during the course of the hearing. We have 12 witnesses on 5 panels.

Having said that, may I just ask that we hear from one more Republican member and one more Democratic member? May I ask unanimous consent for that?

Mr. KENNEDY. Fine with me, as long as I am the Democratic member.

Mr. NUSSLE. We already heard from a Democrat.

Chairman NEAL. How about two more Republicans and one Democrat? Then we can go to the hearing.

Without objection, that will be so ordered.

Mr. ORTON. Mr. Chairman, may we have unanimous consent that all other members can submit statements for the record?

Chairman NEAL. Yes. Without objection, all other members will be able to submit statements for the record.

[The prepared statements referred to can be found in the appendix.]

Chairman NEAL. Mr. Castle.

Mr. CASTLE. Let me thank you for the opportunity of sitting here with this subcommittee. As you know, I am not a member of this subcommittee. I am a member of the Banking Committee. This is in the interests of Delaware, and you were kind to let me participate.

Mr. JOHNSON. Mr. Chairman, are you going to allow the subcommittee members to speak or go out of order?

Chairman NEAL. I am sorry, Mr. Johnson. I made a mistake.

Mr. JOHNSON. Mr. Thomas and I would both like to have a turn.

Chairman NEAL. Well, we just got unanimous consent there would be two Republican members.

Mr. JOHNSON. There are two of us on the subcommittee. I suggest we ought to be the ones that are allowed to speak.

Chairman NEAL. Well, all right.

Let me try another unanimous consent request since you feel so strongly.

Mr. KENNEDY. Mr. Chairman, I will yield a couple of minutes of my time to Mr. Castle when you recognize me.

Chairman NEAL. Is that all right?

Mr. CASTLE. I appreciate that. That would be fine. I assume this is not my time.

Chairman NEAL. If you don't mind?

Mr. CASTLE. Fine.

Chairman NEAL. Mr. Thomas.

Mr. THOMAS. Thank you, Mr. Chairman.

I think I represent a different point of view. To do it concisely, let me read a letter from my Governor:

"I am writing to urge you to support the bill as introduced when its subcommittee caucuses after the hearing. I understand some members on the subcommittee are concerned that doing so would require New York to disgorge monies it seized over the past 20 years from banks and brokerage firms, and that this somehow would be unfair.

"Nothing is further from the truth. The Supreme Court held New York must disgorge the funds it wrongfully seized, and the Special Master carefully considered and rejected New York's fairness argument. He noted New York's purported 'hardship represents a calculated risk New York has imposed on itself, and not an unjust surprise or unfair burden.' The question, then, is not whether New York must disgorge, but to which States, to Delaware and Massachusetts alone, or to all States in a fair and equitable basis?

"On January 21, 1994, New York settled its litigation with Delaware and will pay them $200 million. This represents a windfall of $800 for each Delaware household. If New York is willing to pay the smallest State in the Union $200 million, surely it is not unfair for New York to pay a reasonable settlement amount to Wyoming."

I would stop there. I think I made the point.

Chairman NEAL. Mr. Kennedy.

Mr. KENNEDY. I will be brief, Mr. Chairman. I would like to submit my entire statement for the record.

I suppose when I first heard of this issue of escheatment I figured this was Rosanne Rosannadanna's dream come true. It would confirm in the minds of the ordinary taxpayer what we do up here is regulate escheating.

In any event, the fact is, Mr. Chairman, that this bill that we have before us would try to ensure the recall of escheated funds distributed fairly to the States, but the legislation would not achieve that end. It is misguided, confiscatory. It would change the rules of the game after the game has been played.

By applying retroactively, it would force States to divest themselves of the funds they have already received and spent. That sounds like an unconstitutional taking to me. Moreover, the bill would force the different—even though States have acted in a total compliance with existing law the Supreme Court upheld just this year.

Just how Massachusetts and other States would divest themselves of these funds is still a mystery. The bill sets up a complex set of rules that will themselves cost States millions of dollars. At a time when we are supposed to be reinventing government in order to save taxpayers money, this bill would throw a huge monkey wrench into the machinery of State government. It would eat up the costs and fees of the very funds that the States are now fighting over.

Mr. Chairman, I would ask my entire statement be submitted for the record. I would yield the remainder of my time to Mr. Castle of the State of Delaware.

Mr. CASTLE. I thank the gentleman from Massachusetts.

Mr. Chairman, I have cut this statement four times since I have been sitting here. Let me get to the essence of this matter.

We are dealing with an historical matter here, the Supreme Court set of decisions that go back in some ways to the beginning of this country, and specifically on some of these issues for 30-some years. You are dealing with, in the case of retroactivity claims, going back some 20 years.

Essentially, we are dealing with a very small percentage of unclaimed securities of all the different kinds of escheatments that exist out there. These are merely funds owed by one financial institution to another financial institution. It is not somebody located in some State. If it were, it would go back to that State automatically. This small percentage of lost funds don't happen to work in that particular way.

In this case, starting in 1988 when Delaware sued the State of New York because we felt they were improperly withholding money, it has been ongoing since then. It involved each and every State of the United States of America, being a part of this decision by the Supreme Court of the United States.

The legislation which we have before us today is unconstitutional. It is patently unfair, an administrative disaster, and the real winners in this thing are lawyers, accountants, computer programmers, whatever else.

Judge Gibbons will testify today. Reading his testimony, on page 1, he says, "H.R. 2443 is plainly and incurably unconstitutional." He goes on to say, only a State with a clear connection to a creditor or debtor may escheat. He says, in all 50 States and the District of Columbia the issue is either whether the corporation is either a creditor or debtor.

The theory of this legislation is the State of the principal place of business the issuer should control. Its very premise is unconstitutional. Under any kind of legal interpretation I have seen, this is unconstitutional.

It is also patently unfair, as I indicated. It ignores years of precedent. And New York and Delaware made up for the fact we do not have oil wells and other things, our natural resources, to make sure we are a State where corporations and businesses are welcome and our court of chancery and the professional people we attract to our State.

As I already indicated, there are Supreme Court decisions supporting this for years and years and years. We are dealing with pending litigation. You gave a warning about that in the beginning.

Then there is the whole issue of retroactivity, the dollars collected and spent, all in accordance with the laws of the United States of America. Are we going to go back and do that? That is astounding we would consider undoing that. The whole fundamental thrust of the issue of executive offices is supposed to represent what is fair here.

What about where the stockholders live? What about where the capital is raised? Where the employees live? Where the products are sold? A lot of these are moving to other parts of the country at this point because of reasons of lifestyle or whatever it may be.

This is an administrative disaster. It is a complex, very expensive procedure that tracks the location of the corporate and municipal users, particularly getting into the retroactivity area. It involves the escheat laws of all 50 States, complex legal matters we have to deal with. The States factor in administrative, legal, and accounting fees.

We have to remember we are dealing with trial lawyers in this particular situation. We are dealing with a circumstance in which we believe under this legislation one trial lawyer will receive more than 34 of the States which are making a claim. This is a Congress which is getting into trial law quite a bit over the years. That is a statistic to look at. I hope everybody examines that before they support this legislation.

Sure, people want to get paid.

I might also add contingency lobbying is not legal in 30 of the States. It is questionable as to whether we should be doing what we are doing here at all.

There are a tremendous number of reasons—valid, legal, fairness reasons—why this legislation is not in the best interests of the Congress of the United States. The hearing is fine. We have wonderful witnesses to testify. But the bottom line is this legislation should not go ahead.

What should go ahead is the Supreme Court decision and the negotiation among the States to work out whatever their differences are which they have been working on for some time now. That is fair. That is the way to end this proceeding.

I yield back the balance of my time.

Chairman NEAL. Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

I think we have a hearing of great importance. I know you are interested in getting to the testimony in a hurry.

I just want to welcome Kay Hutchison, the Senator from the State of Texas on our first panel, and, of course, our great Governor from the great State of Texas, Ann Richards, on the second panel. I thank them both for being here and extend my personal thanks for their work on behalf of this issue.

Mr. Chairman, while I won't prejudge the testimony we are about to hear, I think it would have to be something that is extraordinary to reveal that—anything that would justify any delay in this legislation's immediate consideration and passage. As far as I am concerned, there is no justification for any State receiving unclaimed interest on some other State.

I am equally adamant unclaimed dividends belong to the States that provide the services and conditions that attracted the business to pay those dividends. As a matter of fact, Mr. Kennedy, talking about retroactivity, I sort of recall him voting for a retroactive tax earlier this year. So I think there is some substance for that issue.

In addition, I am told in an earlier case in New York State, the judge concluded hardship represents a calculated risk that New York has imposed on itself and not an unfair burden. It seems to me that maybe they stole those monies from the other States. So I think we ought to do something about the theft from our States, and I look forward to the testimony that is coming up on these two panels.

Thank you for your time.

Chairman NEAL. I thank the gentleman.

Well, as can be seen, there are minor differences of opinion on this legislation.

Our first panel is comprised of the Honorable Charles E. Schumer, who is a member of this subcommittee and also a very active member of the full Banking Committee; and the Honorable Kay Bailey Hutchison, U.S. Senator from the State of Texas.

Wonderful southern gentleman that he is, Mr. Schumer——

Mr. SCHUMER. Southern Brooklyn, Mr. Chairman.

Chairman NEAL. Has urged us to recognize Senator Hutchison first. We will do that and then hear from our other distinguished colleague.

Mrs. Hutchison, your entire statement will be put in the record. We ask you be a little brief so we might hear from all of our witnesses.

STATEMENT OF HON. KAY BAILEY HUTCHISON, A SENATOR IN CONGRESS FROM THE STATE OF TEXAS

Senator HUTCHISON. Mr. Chairman, I know we have two Governors here on the second panel. It would not bother me to have them come on our panel if you would like to have the four of us for their time constraints and then have the questions of the four of us.

Chairman NEAL. I appreciate that. I have already structured it this way. Let's hear from this panel.

Senator HUTCHISON. Let me say that I am interested in the arguments that are made on the retroactivity being unconstitutional, because I did make many of those same arguments myself when the retroactive Tax bill was passed last year. I don't like retroactivity.

But there is a difference here, Mr. Chairman. That is that this suit was filed in 1988. So the State of New York knew that other States were making claims to their rightful ownership of this escheated property. Perhaps they should have set the money aside in escrow, as is often done in lawsuits, so that when the matter was finally settled they would have the money for either distribution or for use in New York.

Let me say that we are really talking here about a bill that is sponsored by Senator Boxer of California and 77 other Senators, and I think there are over 200 sponsors on Representative Gonzalez' bill on the House side. It really is a matter of equity.

We are not talking about escheatment where the last-known address is known. The money automatically goes to the State of last-known address when there is an unclaimed property. We are talking about street-named property. We are talking about two basic types of property here: Interest on the municipal bonds; and dividends on corporate stocks. So when you look at a matter of equity, you are really looking at what State has the most interest.

Well, I think the primary doctrine, as was mentioned by Mr. LaFalce, is clear, that we look for the State that has the most interest. When we have the last-known address of a person, the money goes back to that State.

That should also establish the secondary issue which is which State has the most interest? So we are basically talking here about interest on municipal bonds for bonds that are held in street name and there is no last-known address. Who would the logical State be or which would the logical State be of most interest for those municipal bonds? It is the taxpayers of the State.

For instance, if it were Illinois, the taxpayers of the State of Illinois are issuing those bonds and paying the interest. So, of course, the State that has the most interest, if those funds were unclaimed, is the taxpayers of the State of Illinois. It is not the taxpayers of New York or Delaware or Massachusetts that should reap the benefit. It is the taxpayers of Illinois.

By the same token, if you have dividends from a corporation the issue is what State has the most interest. We believe that the State that has the most interest is the State where the primary headquarters of that corporation is. That is where the employees work. It is where the company is headquartered that is, hopefully, doing well.

I think the argument has been made that infrastructure has been provided. Well, that is where the infrastructure is.

So we, the other States, the 47 States that are not now included, believe that the State that has the most interest is the State where the principal place of business is for that corporation where the dividends are unclaimed.

I guess, to put it simply, Mr. Chairman, we cannot allow the States that got to the head of the line for dinner at the bunkhouse to eat all the food that the ranch hands at the end of the line rode all day to earn.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hutchison can be found in the appendix.]

Chairman NEAL. Mr. Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. SCHUMER. I appreciate the opportunity to testify.

I would say to my good Senator from Texas: Do the ranch hands really want to eat regurgitated food that has already been swallowed and digested? I would not be surprised at what anybody will do for money.

Let me thank you, Mr. Chairman.

I am pleased to have the opportunity to address the subcommittee because I am gravely concerned about my colleagues being misled about H.R. 2443, and I appreciate your opportunity in trying to—when there are 47 States against 3, it is hard to have a hearing down the middle. You have done that. I think all of us appreciate that very much.

Let me say, Mr. Chairman, while this bill may look to the 47 States like the goose that laid the golden egg, the promises this bill makes are just fairy tales. We all know fairy tales do not come true. I welcome this opportunity to set the record straight and to separate escheatment fact from fiction.

Proponents of the so-called Equitable Escheatment Act have circulated wildly inflated projections of each State's potential gain. They have said States other than New York, Delaware, and Massachusetts will get a windfall, millions of dollars, tens of millions of dollars in many cases. They promised you not only the proverbial free lunch but a virtual banquet with all the expenses paid by New York, Delaware, and Massachusetts.

Why not? These inflated projections have conjured up visions of sugarplums dancing in your heads. Well, don't kid yourselves. You will never see that money. The massive gains projected by the bill's proponents are based on the false premise the bill will be applied retroactively, that funds escheated to New York, Massachusetts, or Delaware 10, 15, and 20 years ago will be redistributed.

It is quite different than the Tax Act of 1989 where the taxes had not yet been collected. No court—no court anywhere in America would allow such retroactive taking. This would constitute nothing less than the time-old doctrine of confiscation.

New York lawfully and properly collected these funds under the rules of escheatment in effect at the time and which had been in effect for many years. Those same escheatment rules were reaffirmed by the Supreme Court last year when it decided the *Delaware* v. *New York* case and decided the closest link to the escheated funds was—this is the Supreme Court, not someone from a State with an interest—saying the closest link was the State of incorporation of the broker or bank that held the funds.

Sure, New York benefits. We benefit from the fact the financial services industry is concentrated in New York, just like California benefits from its entertainment industry, just like Texas benefits from its oil and gas industry. Each State has its own local industry contributing to its economy, and there is nothing wrong or inequitable about that.

What this bill sets out to do is makes about as much sense as a bill requiring California to send all the taxes it receives on movie industry revenues to New York because that is where the investment banks are that provide the financing that makes the movie business possible.

I urge you to listen carefully to the testimony of Judge Gibbons, where he will explain that the retroactive application of H.R. 2443 will never withstand the court challenge. I assure you, ladies and gentlemen, there will be a court challenge.

So if you think what this country needs, what the taxpayers in Texas, New York, North Carolina, Iowa, and all 50 States need, is more legislation over a confiscatory peace of legislation and more fees for lawyers, then H.R. 2443 is for you. If you believe the Congress ought to divert all its time and energies to intervene in a lawsuit fully litigated pitting State against State, which does not involve one red cent of Federal money, this bill is also for you.

But if you have a sense of fairness that it does not make sense to just gang up on a few States, then I urge you to look at the facts, separate them from the myths and the sugarplum fantasies that propelled this bill forward.

Let's clear up the big myth about this bill right now. There is no free lunch, no windfall, no sugarplum feast. At most, your States will collect a few crumbs from the prospective application of this bill. Half the States would get—on a gross basis before costs are taken into account, and those are going to be large—less than $1 million a year. Three-fifths of the States would get—also on a gross basis before costs—less than $2 million a year.

These gross figures are based on what States would take from New York, Delaware, and Massachusetts each year; but, of course, H.R. 2443 creates its own sets of costs that will have to be absorbed by the States. It is a two-way street. Owner-unknown funds your State currently escheats from your banks, brokers, and other financial institutions will have to be given up under H.R. 2443, and these will have to be deducted from whatever amount your State hopes to see.

That is right. Many States could lose money under this bill if they do not believe the wildly exaggerated claims I will get to later.

I would also say this, Mr. Chairman. States with large bank headquarters—California, Texas, Illinois and, yes, Mr. Chairman, North Carolina—would lose money, particularly when the retroactivity provision is knocked out. States' future profits will be sharply reduced and in some cases wiped out entirely by the costs incurred by the financial institutions.

Others will talk more about that. The point I would like to make, Mr. Chairman, let's look at the facts. We have talked about these escheated funds. We do not know who the original purchaser of the stock or bond is. Why is the corporate headquarters of the company that issued the stock—why does that have a closer relationship than the broker or banker whom the missing person entrusted his or her funds to? Well, the Supreme Court looked at that and very clearly said that the rule that New York and Delaware says governs does.

If I buy General Motors stock, I have no relationship to Michigan. But if my stockbroker or banker recommended I buy it, they are the next closest link. That is simply what the Supreme Court decided.

Finally, Mr. Chairman, let's look at who the real benefiter is today in this modern-day war between the States. They are the attorneys of a large Washington DC law firm who have mounted a full court lobbying effort on this bill. Why? Because they have a contingency fee basis. If this bill passes, one law firm in Washington, DC, a small set of lawyers will make millions of dollars, in fact, more money than 35 of the States.

They are now using Congress as a tool to line their own pockets. These are the lawyers, these contingency fee lawyers, who promised the States a pot of gold at the end of the rainbow to pressure New York and Delaware into paying large sums in settlement of a claim which the Supreme Court rejected in its entirety.

These are the same lawyers who lost the case in the Supreme Court for the 47 States. And now they are trying to collect their contingency fee by steamrolling this piece of bad law through Congress. It is a lot of money.

According to the New York State office, if H.R. 2443 passes as it is, one law firm, Dickstein and Shapiro, would get $16 million. No wonder they have all the States in a frenzy; $16 million. This is more than half the States would get. This kind of contingency fee lobbying is disgusting, is disgraceful, and, in fact, it has been outlawed in 32 States. Texas outlawed it. California outlawed it. Minnesota outlawed it.

North Carolina outlawed it. It should be illegal. Imagine pushing Congress to act so that, when Congress passes a bill and the President signs a law, lawyers get money. What kind of policy is that?

These same States that outlawed this in their own States have allied themselves with the contingency fee lawyers to push this bill, even though this activity would be prohibited in their own State capitals. In fact, the good Governor from Texas, Ann Richards, who is here today to testify on behalf of H.R. 2443, personally signed into law the Texas prohibition against contingency fee lobbying.

I think these 32 States that have a law prohibiting contingency fee lobbying have a good law. This morning I introduced legislation that will do what 32 States have done already. My bill will prohibit contingency fee lobbying in Congress.

My bill, moreover, prevents the collection of lobbying fees retroactively. If we are going to do retroactivity for this bill, then let's do it for all contingency fees and let's do it retroactively. If this House of Congress can move an escheatment bill that applies back retroactively it also can move a bill making a far worse thing, contingency fee lobbying, illegal retroactively.

It is outrageous, Mr. Chairman. It is chilling and undemocratic that a lobbyist can make $16 million on a contingency fee basis in exchange for Congress passing legislation. These contingency fees are an incentive to deceive. The more the law firm deceives, the more it steamrolls and the more it earns. We cannot allow them to get rich and us to get taken in.

You can be absolutely certain I will attach my Retroactive Lobbying Contingency bill as an amendment to H.R. 2443. Whatever happens to this ill-conceived Escheatment bill, Mr. Nash, your law firm is not going to get a contingency fee out of Congress.

Maybe these lawyers have done one great service with this Escheatment bill. Maybe we will be able to put an end to the bottom-feeding practice where lawyers and lobbyists actually gain millions because they successfully twist the legislative process. It is a disgrace. Whatever the outcome, it should stop now. This gun-for-hire mentality should not come within 30 miles of Congress. And all of those who come before us ought to know that they have been pushed by somebody who doesn't have the same motives as they do.

In closing, let me exhort my colleagues: Do not believe the exaggerated claims of windfall profits to your State concocted by the contingency-fee lawyers who are promoting this bill. Look behind the inflated numbers. Ask the question: Are these projections real? Is this bill fair?

Ask yourself, does confiscatory legislation make sense? Would it make sense if the roles were reversed, if all the 49 States ganged up against your State and made a private pact to retroactively divide among themselves the revenue generated by your State's main industry, to use Congress as a tool to achieve these goals and to fund it through a contingency-fee arrangement that would be illegal in your own State capital?

Think about it if you are from an oil State. Most of the States are not oil States. We can come up with legislation. Think of it if you are a State that has other types of industries. Yes, it is easy to draft legislation and come up with some rationale that pits 48 States against 2 or 49 against 1 or 47 against 3. Let this cat out of the bag and God knows what will happen.

Mr. Chairman, I want to thank you for this opportunity to testify on a matter I feel very strongly about. This is a bad—a very bad—bill.

[The prepared statement of Mr. Schumer can be found in the appendix.]

Senator HUTCHISON. Mr. Chairman, I don't guess you allow rebuttals, do you, of opening statements?

Chairman NEAL. Well, we want to hear all points of view. Let me see if we cannot possibly tease that out in a question and answer period.

Senator HUTCHISON. I understand.

Chairman NEAL. You, certainly, will have another opportunity to say something.

I have just a brief question to you, Chuck, if I may.

I may not have heard you right, but did you not say the Supreme Court had settled this? I am asking, did you say that the Supreme Court ruling in this case was that the retroactive provision would be unconstitutional? I thought they were silent on that question.

Mr. SCHUMER. There are so many cases, Mr. Chairman, that you go—just call randomly the law schools. Don't say the names of the States involved. Ask them the facts of this case. I would bet you my bottom dollar that 10 out of 10—not 9 out of 10, not 99 out of 100, but 10 out of 10 would say the retroactive parts of this bill are patently unconstitutional.

What I was saying in this case is the Supreme Court looked at the merits of escheatment. They said, if we cannot find the original owner of the stock or bond, who should get the fee? And they felt, the nine of them, that the closest relationship was to the State of incorporation of the broker or banker, not to the issuer State.

By the way, my guess is—I am sure I can be gainsaid by others. My guess is if we did not have contingency fee lawyers out there, the State capitals were not clamoring for this before it happened, this idea was not sui generis. It came as a result of some people being able to make a lot of money.

Chairman NEAL. In this case, though, I agree with you. I don't like the idea of retroactivity. As a general principle, in this case, I want to be clear on this point, if I may. As I understand, the Court in its ruling was silent on this question?

Mr. SCHUMER. It was not asked about retroactivity. It was silent on the ruling. I don't think that that is in dispute. We will ask the Court, if this bill becomes law. I don't have a doubt in my mind that it will be declared unconstitutional. This is not—someone mentioned the retroactive taxes were 1992. Those were not collected yet. These are things that go back 20, 25 years.

Chairman NEAL. Mr. Thomas.

Mr. THOMAS. Thank you, Mr. Chairman.

Senator, what is your impression of the relationship between the oil business and Mr. Schumer's proposition?

Senator HUTCHISON. Well, let me just say a couple of things.

First, of all, we have gotten into a lot of arguments on the retroactivity. This lawsuit was filed in 1988. The Retroactive Tax bill was passed in August. People had spent money, but Congress saw fit to pass a retroactive bill anyway.

We should have had a moratorium on the collection of this money or at least an escrow account since 1988 for any fairness purposes.

But, Mr. Thomas, if there is going to be equity, perhaps we could separate the retroactive part from the future part. No one has made an argument yet against the equity of determining which is the State that is most closely allied to the property.

I can—I think it is a matter clearly for Congress to decide because this is a matter of dispute among the States. Congress is the exact body that should make this decision. And, particularly, the Supreme Court has suggested that Congress do it. So we are in the right forum.

And I think that to say that the oil and gas business is in any way synonymous with the financial institutions that hold stock that is bought by another owner—this is not money owned by the State of New York, Delaware, or Massachusetts. This is money owned by someone else. This is stock owned by someone else. It is a municipal bond issue by the State of California or the State of Illinois.

Of course, the people must closely ally with that money or the taxpayers of those States. There cannot be an equitable argument made that that money should not go back to the State of origin. That is exactly what we are talking about here.

Mr. SCHUMER. Mr. Thomas, if I might just answer the question as well?

First of all, I find it a novel argument—I have never heard it before—that the minute a lawsuit is filed that whoever the defendant is in the case should automatically start a contingency fund in case that suit prevails. That is rather original. I suppose the bail bondsmen and other bonders would love that argument because we would have no money left in America, just all the money being held in escrow, awaiting the outcome of lawsuits.

The second thing I would say is that if 1988 is the year, why doesn't your bill say it? It goes back to the 1960's. So I don't think there was a claim about 1988.

The third thing I would say, the point I am making about the oil industry—I could find an argument, and I could supposedly make out an argument about why all the taxpayers of America have an equitable stake in the oil that is under Texas' or Wyoming's grounds. Why the Federal Government shouldn't redistribute some of the tax revenues that come from that State just as this bill wants to redistribute the money held in New York or Massachusetts or Delaware. You can make that argument as well.

Mr. THOMAS. I am overcome by your filibuster here. I have to run. I don't agree with that thesis, of course. I could make an argument that 50 percent of Wyoming belongs to the Federal Government and should not. Fifty percent of New York does not. I am concerned you are more arguing the process than the substance.

Mr. SCHUMER. I am arguing both, Mr. Thomas. I think the process led to the substance. The substance wouldn't come out by itself.

Mr. THOMAS. Does the agreement with Delaware have any retroactivity?

Mr. SCHUMER. The agreement with Delaware is an agreement that deals—yes, it does have retroactivity. Because it was sanctioned by a court, number one; and, number two, those monies were held in dispute.

Now the States—your State, Ms. Hutchison's State—is welcome to come to an agreement among States that is not a statute imposing a retroactivity thing in a nonvoluntary way on a taking. That is the difference.

If you sue me and we agree that 5 years ago I did something and ought to change it and ought to pay you money for it retroactively, that would be fine; but that is an agreement among the States. We have never, ever, ever imposed something statutorily retroactively like this.

Mr. THOMAS. I have a hunch that this legislation does not create some sort of risk. There will be very few settlements with any other State.

New York argued before the Supreme Court that the Master's intervention infringed. Even Delaware agreed. Now we have a bill supported by 47 States that would equitably charge Federal common law and recognize modern technological realities. We require the State entitled to custody proceeds to that State where it originated. What is wrong with that approach?

Mr. SCHUMER. Let me try to answer that.

The problem with your retroactivity argument is this: The Supreme Court didn't change the rule retroactively. It said this was the rule that governed all along. New York had not been complying with it. That is why the settlement evolved from that.

So there was no change in the statute retroactively. In terms of your second question—would you repeat that?

Mr. THOMAS. Just generally, the Supreme Court, New York argued the Master——

Mr. SCHUMER. Oh, yes. I don't dispute, Mr. Thomas, for one moment that Congress could come in and prospectively change the rules of escheatment. My argument there is, number one, this has been decided by the Supreme Court and that is the fairest way to settle disputes like this. Otherwise, frankly, each State's interest will govern.

Second, without the retroactivity, it may well be for most States, particularly a small State like yours, that the costs of doing this will exceed the benefit you will gain. Without the retroactivity we would not have had the lawyers go around. We would not have had these monies—the sums of $1 billion—being bandied about. I don't think the bill ever would have happened.

But do we have a right to prospectively change the law? Does Congress? Yes.

Mr. THOMAS. Thank you.

Chairman NEAL. Mrs. Maloney.

May I also point out that Governor Richards has a time constraint? We may try to finish with this panel soon.

Mrs. Maloney.

Mrs. MALONEY. Senator Hutchison, you testified you believe the money should go back to the State of origin. Why is that equitable? If a company is headquartered in Cleveland, Ohio, yet has manufacturing plants and distribution centers in North Carolina, Virginia, and South Carolina, why should Ohio get the money? Aren't the dividends as much the fruits of labor of the activities in the various States?

Why should it just go back to the site of the executive headquarters? We have many executive headquarters in New York that only have 10 or 20 people there. The other activity is in other States. Why do you argue it is just where the executive quarters are?

Senator HUTCHISON. I think you have to say which State has the strongest interest. Presumably, the corporation establishes its headquarters where it has its strongest interest.

Now you could certainly make the argument and perhaps the corporation would say we have a large manufacturing facility in another State and we would choose to make that our headquarters for these purposes. I am not really arguing that the largest operation that a corporation has shouldn't be the closest in association for these purposes.

I think that you have to make a judgment call. And when you do, I think it is very clear that the corporate headquarters is closer than the financial conduit.

Mrs. MALONEY. Are you not arguing that Texas is entitled to money that one New York bank owes to another New York bank? Isn't that absurd?

Senator HUTCHISON. I don't follow you.

Mrs. MALONEY. Let me ask you one thing. If this were to pass, where would you—how would you go back and find out the escheated funds 10 to 20 years back in Texas? You think it is appropriate for Congress to change the rule of law and then punish a State for failing to follow that newly minted law back 20 or 30 years before? Where would you find the money in your budget?

Senator HUTCHISON. There is no Federal law. This has been a matter of New York and operation. The States have started keeping track of these monies probably around the early 1970's; and they filed a lawsuit in 1988 saying that the New York firms should not have been keeping this money.

Mr. SCHUMER. Would the——

Mrs. MALONEY. One second. Once a corporation issues dividends, it has no more interest. The company already got its money for its stock. You are going back and claiming just because of where——

Senator HUTCHISON. What State would have the most interest in a corporate dividend? Would it be the State where the major operation is? Where the employees are? Where that company has been able to build a successful track record? Or——

Mrs. MALONEY. Once—then it has no more interest in a company, is it not true?

Senator HUTCHISON. For another owner? The company—the financial institution does not have any ownership relationship. They merely hold that account in a street name. Can you make the argument seriously that the taxpayers of Illinois should escheat money to the State of New York on their municipal bonds?

Mrs. MALONEY. But you already got its money for its bond. Once a corporation issues a dividend it has no more interest in the company.

Senator HUTCHISON. But, Mrs. Maloney—is that your name? I am sorry, I can't see your nameplate.

How can you say that the taxpayers of Illinois or North Dakota or California who are issuing bonds to build roads would have less interest in that bond than the person who holds it in street name in New York City?

I mean, you have to make a judgment call here. There is no perfect answer because we do not know the owner. The perfect answer would be if you know the owner.

But I submit that the primary rule makes sense. You go to the most closely associated State of the owner, a last-known address. That is the State that it goes to. But where we do not have a last-known address, you have to make the judgment call. That is why we have a Congress and a Federal Government.

I think the taxpayers of any State that has issued municipal bonds, has borrowed money, has the prime right to that unclaimed property. It should not be some financial institution in New York that happens to hold it in street name.

Mrs. MALONEY. Mr. Schumer.

Mr. SCHUMER. I would simply say you made the argument, Congresswoman Maloney, very well.

The Senator is saying it is the taxpayers in one State versus a financial institution in another. Not so at all. Taxpayers in the State got their money when the bonds were bought. The corporate—corporation got its money when the bonds were issued. Now they want to double dip. They want to get the money the first time when the bonds are issued and get it again because the owner was lost.

If you want to know—and this is the Supreme Court deciding—Senator Hutchison said that we didn't address what should happen prospectively. We sure did. The Supreme Court did, looking at it. They said in the general common law, I am a bond purchaser. I have faith in the person whom I have given jurisdiction over my trust, over my bank account to. That is who I am closest to. Not the corporation that might be headquartered in another State.

I didn't buy it because of my love of the corporation. I bought it on a practical, contractual basis. But if there is an issue of trust, if there is an issue of closeness, if there is an issue of gravity, it goes to the person I entrusted this financial thing to.

By the way, this isn't an issue of taxpayer versus taxpayer. It is the taxpayers of one State versus the taxpayers of another. You prefer yours. I prefer mine.

But let's not have this that says, oh, it is the financial institution of one State versus the taxpayers of the other. It is the State governments in each that benefit.

The final thing I would say is this—just one more point, because I think something was misstated. There was a law on this. It is not that there was no law on this. There was a common law which the Supreme Court recently affirmed. We do not need a statute to say we have it. Most of the things that govern us are not governed by statute but by common law. You can seek to change that law by statute prospectively. But to say that, until now, there has been no law is totally incorrect. There is a lot of law on escheatment that States and individuals follow day in, day out and have for the last—since Anglo-Saxon law started.

Chairman NEAL. Thank you.

Mrs. MALONEY. Mr. Chairman, since the time is up, may I submit for the record additional questions for the Senator?

Chairman NEAL. Without objection.

Whoever is next, I want to point out we have many other panels. We need to hold it down or we will not hear from any others.

Mr. Lazio.

Mr. LAZIO. Mr. Schumer, I know you worked very hard on this issue. I appreciate your work.

I wonder could you speak to the due process question with respect to banks being—having jurisdiction extended over them? With respect to a particular State like——

Mr. SCHUMER. Yes. An argument has been made that, prospectively, this ruling would be unconstitutional because it seeks to reach in and determine powers that have been traditionally left with the States and with financial institutions and the relationship between them, not in interstate commerce.

I suppose those on the other side would make an interstate commerce issue. That to me is—that is up in the air. I would not say that unequivocally to do it prospectively would be unconstitutional. In fact, the odds are probably pretty close one way or the other. Certainly, retroactively, I think it is unequivocal it is unconstitutional.

There is even a good prospective argument that the States could not do this. Although, as the Senator pointed out—or as I think our chairman pointed out—the Supreme Court said the States wanted to go forward prospectively. They should. They then reserve the right to judge what they did.

What might happen, even though the Congress would have the right to do it if we passed this particular law, they might say there is so little connection in reference to the question Carolyn asked, so little connection between where the corporate headquarters is and where the money should go that that law would violate due process and be unconstitutional.

Mr. LAZIO. Thank you.

I want to welcome you, Senator Hutchison. Nice to see you.

I am having trouble understanding conceptually where your position lies. I think some of my colleagues spoke to that also with respect to interest that States such as California having people in the movie industry, Texas, the oil industry. I go talk to groups that—I just want to clarify your position.

Let me just use an illustration. Let's say that Ford assembles an automobile in Michigan and sells it to a dealer in New York who sells it to a New York resident. If the automobile is stolen and then the vehicle identification number is removed, no police report is filed. The police recover the car. The owner is unknown. Who owns the car?

Under your analysis, the ownership would escheat to the State of Michigan because that is where the principal executive offices of Ford are. Do you think New York should ship all abandoned cars to Michigan? Is this a parallel argument you are making with respect to escheatment?

Senator HUTCHISON. If the person buys the car in street name, you have a point. But, you see, people do not buy cars in street name.

You know, the argument has been made here that someone entrusted their money to this person in New York and, therefore, New York has the interest. Well, the person entrusted their account to stockbrokers all over America. It is the stockbrokers who transferred it to their headquarters in New York to hold it in street name, probably because that person traded a lot, and it was easier to trade by holding it in street name.

I think New York, Massachusetts, and Delaware are fully compensated because they get the principal and the intermediaries are able to use the interest on that money for 3 to 5 years. They get their windfall by being the intermediary. But the whole argument of escheatment is one that is fuzzy because, obviously, you want to go back to the original owner if you possibly can.

But the question arises when you do not know the owner where is the fairest place to send the unclaimed property? And I am just trying to make the equitable argument that the fairest place is not the financial intermediary that is holding that money from stockbrokers all over America. Certainly, if it is a municipal bond, the taxpayers of that State are clearly the people who have the most interest. If it is a dividend of a corporation, it is a closer call.

Mr. LAZIO. I am concerned about the equity argument, too. I think that comes back to the point of Texas.

Mr. Schumer.

Mr. SCHUMER. You opened up a fruitful field for endeavor. I wondered what happens in a State like Texas where someone is listed as having title to some oil property or other property. They cannot find that person; they die; they die intestate or maybe there was transfer that did not happen. I wonder what happens in Texas law. What happens in every other State's law when there are analogous situations with property held in that State?

My guess is if you find it, each State in the area where they have some domination might end up getting or they have some preponderance they might end up getting. I think we ought to look at that. The gentleman asks a good question.

Mr. LAZIO. I note for things like disaster assistance, hurricane assistance in areas that do not affect my district because I think some day in some way it might be my district that gets affected.

You never know the turns of events when your State or district is devastated by an ironic turn of events. Most people support that. I hope they keep this concept in mind as well.

Chairman NEAL. Mr. Frank.

Mr. FRANK. If I understand the distinction correctly, the Supreme Court rejected the Master's recommendation and held that the State of incorporation of the intermediary was the appropriate place?

Senator HUTCHISON. The Supreme Court actually said that precedent required that they follow the State of incorporation, but they also invited Congress to settle this dispute more equitably.

Mr. FRANK. That is deciding the case.

Senator HUTCHISON. The Supreme Court said Congress should step in and decide this question.

Mr. FRANK. True. But they didn't—the Supreme Court did not invite them to do it retroactively?

Senator HUTCHISON. The Supreme Court said Congress should make the decision—but they were reviewing accrued claims.

Mr. FRANK. But not retroactively?

Senator HUTCHISON. I think you can split this argument. Let's talk about the equity in the future and then the retroactivity.

Mr. FRANK. I appreciate that. I think that is appropriate.

Senator, when you say the Supreme Court said precedent required it, that is called deciding the case. When the Court says precedent requires this—the Supreme Court, in particular, has, after all, the right to overturn precedent. They have done that.

When the Supreme Court said this is what precedent requires, I would comment on the State of the law. They are reaffirming, saying this is precedent. We, the Supreme Court, decide to reaffirm the precedent, understanding Congress could change it if they wanted to.

That is a strong argument to me against retroactivity. I must say when the Court says this is the way it has been done, the retroactive question does disturb me. I agree.

As to the future, it is a much more open situation which we can talk about, but the—I have not been able to think of comparable case where a case went to Court, the Supreme Court decided it and we retroactively overturned what the Supreme Court had decided.

Prospectively, I think that that is right. But particularly, as I recall it, in the Judiciary Committee, the suggestions of retroactivity, they are very, very rare. Maybe when there is an overwhelming individual right concerned we would deal with it. The reluctance to get into retroactivity, I think, is justified.

Go ahead, Senator.

Senator HUTCHISON. I was going to say on the question of retroactivity, I think New York has been on notice from 1988 forward. These had been collected, and you can go back to the 1970's. But it is a matter of who are the rightful taxpayers once the decision is made.

On the second issue, prospectively, it is the checks and balances in our system that when the Supreme Court interprets a law or makes a ruling and Congress thinks that that is not the right ruling, Congress will step forward and pass a new law.

Mr. FRANK. I do that prospectively. New York may have been on notice in 1988 this was in dispute before the Court. The Court decided—it decided that the principal of the intermediary was the correct one. New York and Delaware obviously had to work that out.

But I will stop at this point. I know we have further panels, a couple of Governors.

Mr. SCHUMER. Mr. Frank, a brief point I made before, but I would like to make again.

The Court said Congress could come in and rule and go forward prospectively. It didn't say they should. It said they might. Then they said they would review it to see if it met the kind of due process claims that Mr. Lazio brought up.

Mr. FRANK. That was nice of them.

Mr. SCHUMER. Thank you.

Mr. FRANK. I yield back, Mr. Chairman.

Chairman NEAL. I thank the gentleman.

I have a suggestion. Since Governor Richards has a time constraint, could we go to the next panel and maybe pick up the questioning with members of the subcommittee who have not had a chance to question this panel?

Mr. HUFFINGTON. I have one remark to make.

Chairman NEAL. I would be glad to hear that comment.

Does everyone agree with that? I think we will get similar answers.

Mr. Huffington.

Mr. HUFFINGTON. The reason I wanted to make a comment now is there seems to be a great deal of concern about retroactive or retroactivity. I didn't see that last year when we were voting on Clinton's Tax bill or the Budget bill that had retroactive taxes.

If the members of this subcommittee who voted for that bill would be willing to reverse their stance on retroactivity, I could understand their argument. I don't think retroactivity in general is at all a good idea. California had sent $22 billion back to this government because of those tax increases; $22 billion. All we are asking for this is $100 million. If there is equity, you shouldn't have a problem with this.

You cannot have it both ways. You cannot have retroactive taxes and no retroactivity on the escheatment.

We will not go on with this, because we wanted to go to the Governors.

Senator HUTCHISON. Mr. Chairman, in closing, I would like to say perhaps this should be the subject of the House's next Oxford Union debate.

Mr. SCHUMER. Mr. Chairman, I want to thank you. I made the argument before Mr. Huffington came in. The tax law concerned taxes that had not been collected that were for that year. Time had begun to tick, but they were for that year.

It is different to go back 20, 25 years. It is different when the argument is about distributions of monies among two parties that are not the Federal Government. I think, if the gentleman would check, the statutory law defined that.

Mr. FRANK. Would the gentleman yield?

Would you point out, since we are keeping score, the amount of money California sent to us after the last Appropriations bill? That is the gross figure not the net figure of what California sent to the Federal Government. I think they got most of it back a couple of months later.

Mr. SCHUMER. California—most of us voted for that aid—is now coming to us for that. I agree with that. I suppose that kind of spending was OK.

Senator HUTCHISON. Thank you, Mr. Chairman.

Chairman NEAL. I would like to thank both of you very much. You helped us understand this a little bit better.

Our next panel is comprised of the Honorable Ann Richards, Governor of Texas, and the Honorable Thomas Carper, Governor of Delaware.

Welcome.

Chairman NEAL. Tom is a former member of this subcommittee, a former very outstanding member of this subcommittee. Welcome back.

We will put your entire statements in the record. We look forward to your summaries with a little time for questions and answers.

STATEMENT OF HON. ANN W. RICHARDS, GOVERNOR OF TEXAS

Governor RICHARDS. Thank you very much, Mr. Chairman, members of the subcommittee. I appreciate very much your having this hearing and having us here this morning. I appreciate the opportunity to testify on H.R. 2443, the Equitable Escheatment Act.

It occurred to me as I listened to the previous testimony that some clarification needed to be made about escheat law and what it is, and that is, when the address of the missing owner of intangible property is known, the State of the last known address of the owner, who is the intended recipient, is entitled to escheat the property. I think everyone agrees with that.

If the owner is unknown in a two-party transaction, the State of the debtor that is the originator recovers the funds.

We heard a great deal of talk here about whether you trust a banker more than you trust a corporation that has been the originator of the bonds. I want to emphasize to you that, in escheat law, it is recognized across the board that the goal is to return it to the State of the originator if the person is unknown. In that way, the State of the intended recipient or the originator recovers the property. And I think that is the basis under which this discussion takes place.

This act concerns an issue of importance not only to the State of Texas but to all the other States. I believe that you all have received in your packets a communication that was signed by 46 Governors expressing their support of this legislation.

This legislation deals with the question of which State is entitled to funds from dividend and interest payments where the owner is unknown.

Because most of the financial intermediaries are located in New York, the State of New York has kept these funds which has added up to almost $1 billion over the last 20 years. Delaware sued New

York State for a share of this money because it is the State of incorporation for these financial firms.

This situation is unfair because giving money to the State where the brokerage firm is incorporated does not reflect where the funds originated or who owns them. Here is how the bill would change that rule and make the distribution fair.

Let's consider a revenue bond issued by the city of Houston. This bond is paid for by the taxpayers in Houston. Any unclaimed distributions on this bond are now kept by the State of New York when the owner is unknown. Houston taxpayers are indeed fine and benevolent people, but I don't think they would expect that bond proceeds that they paid for be used by New York State.

Under this legislation, these unclaimed payments would be returned to the State of Texas. The bill provides that unclaimed funds would be returned to the State where the principal executive offices of the issuer are located. So instead of saying that the unclaimed money belongs to the State where brokerage firms are located, dividend payments from stock on a Texas company would be returned to Texas.

It is easy to determine the location of the principal executive office of these companies because they designate that on their SEC filings.

In the past, New York has kept the unclaimed dividends paid by such Texas companies as American Airlines, Hughes Tool, EDS, and Mesa Petroleum. I don't think anyone would mistake T. Boone Pickens for a New Yorker.

Without the legislation, Delaware would also claim a portion of these funds because those companies filed paperwork to be incorporated there. Under the bill, leftover funds from Pennsylvania steel mill stock would go to Pennsylvania. Leftover funds from the sale of stock of an agriculture business in North Carolina would go to North Carolina.

Mr. Chairman, this is fair. We cannot always trace the owners of the funds, but we do know the owners are not all from New York and Delaware.

Mr. Chairman, you asked about the effect this legislation would have on Texas. We estimate that approximately $60 million of unclaimed distributions issued by local governments and companies with headquarters in Texas would be rerouted to Texas if the bill passes. We also expect to recover $5 to $10 million annually in the future.

In truth, the amount is really not the issue. The issue here is fairness, whatever the amount might be.

At your request, Mr. Chairman, the treasurer of Texas, Martha Whitehead, analyzed the amount of dividend and interest payments presently returned to our State. You have received her response, and it is attached to my testimony.

Approximately, half of the amounts collected under our State's unclaimed property laws will be deposited in a foundation school fund that will directly benefit the school children of Texas.

Because of all of the discussion previously about the issue of retroactivity, I thought that I should also address one segment of that question. Escheat laws, unclaimed property laws are different from other laws in the fact that States hold these monies in perpetuity for the person or owner with the highest claim. When these monies are collected by the States, they are collected with the full knowledge that, should an owner with the highest claim appear for those monies, the owner is entitled to receive those monies.

Every State that collects unclaimed property and escheated property is fully aware that at any time in the future an owner may appear and require payment on that property.

I think that that sets escheated properties and escheat laws aside from any other issue that you might consider.

I am very grateful to you, Mr. Neal, for your leadership on this issue. I am very thankful that Congressman Gonzalez has introduced this beneficial legislation. The bipartisan support for this bill is encouraging.

Mr. Neal, I am indebted to you that you were willing to call this hearing and hold it. I hope that the subcommittee will act promptly on this legislation so that the 322 cosponsors of this legislation in the House and the 79 cosponsors in the Senate will soon have an opportunity to vote on this important legislation.

I thank you very much for the opportunity to express my unqualified support for the Equitable Escheatment Act.

[The prepared statement of Governor Richards can be found in the appendix.]

Chairman NEAL. Thank you, ma'am, very much.

Now we would like to hear from Governor Carper of Delaware. When you are through, will you come around here and join us again?

STATEMENT OF HON. THOMAS R. CARPER, GOVERNOR OF DELAWARE

Governor CARPER. Thank you.

Chairman NEAL. Welcome. We would like to hear from you.

Governor CARPER. It is funny you ask that question. I was here visiting in the House of Representatives last summer. I was visiting some people on the House side, and at the end of our meeting there was a vote on the House floor, and the Members who went said come over to the House floor and say hi to the folks.

I did. I got out on the House floor, and I walked on to the House floor and reached into my wallet as I did for 10 years for my voting card to vote on—I couldn't find my card. They sure wouldn't let me vote.

It is good to be back. It is good to be back in this room where I spent a lot of time with a number of you.

There are really a flood of memories that swept over me as I walked into the room and sat down. It reminded me of a lot of friends that I made here and a lot of issues that we grappled with, a lot of days, long days and real long nights spent here in 2128 Rayburn. I think what we tried to do is what we thought was fair. I believe we tried to do what we thought was fair.

I remember grappling with issues including the S&L bailout. We had enormous arguments as to who should pay the costs of that. Should we make States in the southwest where most of the S&L losses occurred? Should their FSLIC premiums be raised? Or all of those, including in Delaware which never raised an S&L?

We had similar kinds of arguments over the bailout of the FDIC. Should we go to the States where the losses were incurred or should all financial institutions pay more by increasing FDIC premiums?

It has been alluded to when there is an earthquake in California do we stick the bill to California or do all of us reach in and help out a neighbor? When there is a flood in Florida, a hurricane, and there are enormous losses and property damage there, do we say to the people hurt there, you have to pay extra premiums into the National Flood Insurance Program? No.

We all didn't, including in Delaware where we didn't suffer losses at all. When there are droughts in the Midwest and enormous crop loss damages and farmers did not buy national crop insurance, do we say you eat your own losses? No, we didn't. We, as all the States, including Delaware, chipped in to help out all those institutions.

Those are the kind of fairness issues we grappled with in the decade or so I spent here in this Chamber with many of you.

Mr. Chairman, I have a statement I would like to ask be submitted for the record along with attachments. I want to summarize what I have to say.

Chairman NEAL. Your entire statement will be included in the record.

Governor CARPER. Let me reiterate a couple of points.

In 1993, there was a Supreme Court decision—a Supreme Court decision in which damages were awarded to the State of Delaware, damages New York State has had to pay. In its decision, the Supreme Court said this is the right thing to do in substantiating case law, common law for decades. This is the right thing to do by way of precedent. This is the right thing to do by way of fairness, efficiency, not just for the States but the financial intermediaries that are involved.

I believe it has been made by other opponents of H.R. 2443 the legislation is patently unfair. It is, I think, clearly unconstitutional.

Just imagine this: If a law were to be passed in 1994 changing the way a particular issue is governed and then we turn to the States and say not only are we changing it for 1994 and going forward, but we will change it for every year prior to that, how would you feel? How would you feel if that kind of claim were made against your State? You wouldn't like it. You would cry out as well. We are, too.

It is not just Delaware that will be affected by this legislation. It is every State. Every State will owe money because of this change in the law that is adopted, and every State will be owed some money. Financial institutions will owe some money. And they will be owed some money.

Now, folks, a couple of people tried to explain what is going on here. I learned a lot as Governor. I learned more about escheats and escheatments than I ever learned about anything in the last several weeks.

There is a chart over there that lists 51 different kinds of escheatments. The most common one exists when we know where the last-known address is for the owner, the beneficial owner of a share of stock or whatever the property. We know where they lived.

When we cannot find that person, the State that realizes the value of whatever the property is, is the State of the last-known address.

In roughly 90 percent of the cases, we have a last-known address. In that situation, if it is Texas that is the last-known address, Texas gets the money. If it is Delaware, Delaware gets the money.

In less than 10 percent of the cases, the situation is different. The situation—let me walk you through this very carefully. Let's say we have a Delaware corporation that someone from North Carolina buys a share of stock in, a share of common stock. This corporation in Delaware owes you dividend payments.

Let's say you buy the stock through a New York financial institution. They hold that stock for you in their street name. You are the beneficial owner.

Yesterday, I was checking the newspaper. Yesterday 247 million shares of stock traded hands on the New York Stock Exchange. Probably, as much will happen today, tomorrow, and the day after that, incredible changes of ownership.

If that New York financial institution decides to sell or exchange shares with another New York financial institution and while—and I still think the first institution was the owner, the holder of the money in their street name. The first institution sells some of their stocks to another financial institution in New York.

I, as the company, would issue the stock. I will send my dividend check to the first financial institution. I am the beneficial owner of the stock. You will get paid the dividend that you are owed. As the company owing the dividend, I will have paid you. You are the beneficial shareholder. You will receive it. Industry policy is to make sure the beneficial owner of a share gets paid.

What happens here is the first financial institution in New York City gets some money that really should go to the second financial institution in New York. One financial institution in New York owes money to another financial institution.

If they cannot figure that out—and the reason why it gets difficult is because there are so many transactions in the course of a day, a week, a year. If they cannot figure it out, some financial institutions ends up with more dividend payments than they should have had. At the end of the 3-, 5-year period of time, they owe that money to New York State.

Let's take the example of the Houston revenue bond issue. Who benefits from the issue of the bond? Well, Houston does. They get the money that the investors invest in the bonds. What happens? Again, let's say Houston issues the bond and sells the bond to somebody in North Carolina. When they owe a dividend payment it is held again by a New York financial institution. When they owe the dividend in Houston, it goes to the financial institution in New York. They may have sold it to another financial institution.

Under industry practice, you are still going to get your dividend payment. You are still going to get your money from Houston.

What those who proposed this legislation are saying is that Houston, which owes the money in the first place—they owe the dividend payment, they owe the interest payment—what you are saying is the State that owes this—has this obligation—somehow gets the money back.

Well, that is nonsense. They owe the money. You as the holder of the bond have been made whole. Houston has met their financial obligation. What has happened here is one financial institution in New York owes money to another financial institution in New York. This is wrong-headed. This bill is wrong-headed. It is unfair.

Well, what incentives do financial institutions have to reduce this loss, figuring out what New York institution owns money or owes money to others? Well, institution number one ended up with more. They really don't have a whole lot of incentive to straighten things out. Institution number two, who is shortchanged, has plenty of incentive. Less than 0.02 percent of all dividend and interest income is owner-unknown.

Let me just conclude, if I might, with this. Mr. Schumer said it well. This is an issue that is driven by contingency-fee lawyers. They stand to make more money than a lot of the States that are involved.

I am not going to take the time to read it, but on page 15 of my original testimony, which I am summarizing, on page 15 we actually explained what each of the States have to go through in order to realize or implement H.R. 2443.

On page 18 of my testimony, I outline in vivid detail what the financial institutions themselves are going to have to go through. It is not pretty. It is a nightmare for the States and I think for the institutions that are involved.

In closing, Delaware has no oil and gas properties. We have no Hollywood. We have no Silicon Valley, no vast post lines, no timber reserve, no vast expanses of agriculture land. Some States have enormous financial resources. Other States create manmade resources and derive benefits from those. Some, like Florida, take an environment that is inviting and build manmade attractions and resources like Disney World or Sea World in order to derive further economic gain.

In Delaware what we have done—in New York as well—we have provided an environment that is conducive for corporations to incorporate there. We have done it for 200 years. It is a manmade resource. We created an environment that is conducive for financial institutions to headquarter there.

What this bill would do is take away those manmade or human-made resources for us that we have built over decades. H.R. 2443 opens Pandora's box, puts this Congress on a slippery slope. I think it is eminently unfair.

I suggest, Mr. Chairman, in closing, let the States settle their own differences. In 1993, the Supreme Court said, this is the law. This is the way we interpret that law. It is fair. It is consistent with precedent. It ought to be done. It is efficient.

Let us solve our own differences.

In January of this year, 2 months ago, Delaware and New York settled our differences. Damages were agreed to. New York will pay those damages to Delaware over the next 4 years.

We began negotiations with the other States. Let those negotiations continue. We are doing so in good faith. If we cannot solve our problems, fine. Maybe it is appropriate for the Congress to get involved, although I don't think with H.R. 2443—for God's sake, with the New York-Delaware settlement only 2 months old, let us proceed in our efforts to settle with the other 47 States.

Thank you very much.

[The prepared statement of Governor Carper can be found in the appendix.]

Chairman NEAL. Thank very much.

A technical point. You said, as I understood you—I am not sure I got it right. You said, the funds in question would go back to the beneficial owner? It is my understanding that is what is in question.

Governor CARPER. No. What happens is this. Let me give you an example. You buy a common stock in Delaware Chemical Corp., in Delaware. You buy it through a New York institution. When it is time for us to pay a dividend payment to you, we pay it to the institution. You are going to get paid as the beneficial owner. The industry practice is to pay, make whole the beneficial owner. You will get paid.

What will happen—if the first institution changes or sells the stock to another financial institution in New York, the first institution will get the dividend payment. They may not be able to trace it. Who is the next owner of that security? You will get paid as a beneficial owner, but the other institution may not be made whole. The question is, who is owed the money? One financial institution in New York is owed money by another financial institution.

Chairman NEAL. I am not quite following. It is my understanding the funds in question here have to do not with the institution—but, in fact, the beneficial owner?

Governor CARPER. In 99 percent of the cases, Mr. Chairman, the money in question here overwhelmingly is money owed by one financial institution to another financial institution. It is not money owed by the corporation in Delaware to the beneficial owner in North Carolina. That is just not true.

The beneficial owner, under industry practice, is made whole by the payment of dividends. Some one of those New York banks comes up short.

Chairman NEAL. What about beneficial owners that cannot be located? Isn't that what we are talking about?

Governor CARPER. If we do not know where you are, the Delaware corporation, North—if your last known address for Steve Neal was in North Carolina, North Carolina gets the money.

Governor RICHARDS. Mr. Chairman, if I may explain, in any area of escheat this unclaimed property has a very complicated trail. No matter what the description of the type of property it is always as complex as Governor Carper presented to you.

That is why, in the area of escheat and unclaimed property, the term "origination" or "originator" has always been key. That is why this legislation addresses that aspect of escheated property, the property goes back to the State of the originator of the property when the owner is unknown. And, in this case, it is returned to those cities or States or taxing districts that have issued bonds or to the States that the companies designate in their SEC filings as their principal executive office.

Chairman NEAL. What about this—there is one technical point. Is it your understanding that the money that is owed here is owed from one financial institution to another?

Governor RICHARDS. Well, I think that that is the way that Governor Carper presents it. Because, in a literal sense, you can trace it all the way back to the person who eventually bought it.

The point of my comments to you is that it matters not which area of escheat or what kind of transaction we are talking about. It is always very complicated and complex, and that is why origination is the key word.

Chairman NEAL. Let me ask Governor Carper about this. What about this as a matter of principle? Should the money go back where it originated?

Governor CARPER. Why should it?

Same example. Delaware corporation—you buy a share of stock in our Delaware corporation. We have an obligation to pay you a dividend payment. What if it is a Delaware municipal bond that has been issued? We have an obligation to pay you an interest payment. We have paid the payment. All right? You as the beneficial owner received either the dividend or interest payment.

Because one of these institutions gets shorthanded why should my State—we have the obligation to pay. Why should we get the money back? We shouldn't. We have the original obligation to pay. That makes no sense. That is not fair. That is not just.

Governor RICHARDS. But, Mr. Neal, the next step is to say what is fair and just? What is fair and just?

Is it a State that did nothing but file the paperwork involved or whose businesses traded the stock that is the one who should receive the funds? Any time that taxpayers agree to tax themselves to have a benefit for their community, surely goodness and mercy, fairness dictates that if there is some unclaimed portion of those funds it will go back as closely to the State of those original taxpayers.

Chairman NEAL. Mr.—Governor, what do you say about that?

Governor CARPER. I will say one more time, Mr. Chairman: The issuer of the stock, the issuer of the bond has an obligation to pay, make a dividend payment or an interest payment. That payment is made—it is made through an intermediary financial institution who owns in the street name this particular stock or bond. That money is then paid to the beneficial owner. You are made whole. I have met my financial obligation.

Somebody—one of these two financial institutions—is not made whole. They are owed money. We are not sure which—who owns the money, who has the money. We are not sure where it is. They are not sure where it is.

For God's sake, if I have the obligation to pay you in the first place and sent the payment to them, why should the money come back to me when one of them—one of those financial institutions in New York State—is shorthanded? They are the ones that have been—excuse the phrase—they are the ones that have been screwed.

Chairman NEAL. Are they getting the money?

Governor CARPER. Are they getting the money?

Chairman NEAL. Right.

Governor RICHARDS. The money is escheated, Mr. Chairman.

Chairman NEAL. That's why I cannot see if they would benefit from it. If they are the wronged party, how would they benefit under this? If this financial institution, whom you say has not been made paid, is out some money, it is not in any way cured. It has been harmed, is not cured by——

Governor CARPER. That is why they have an enormous incentive to figure out for themselves that financial institutions—they have a real incentive to figure out which financial institutions owe money to the other ones. It is because of that financial incentive that they have that this amount of money is actually diminishing, this form of escheated funds is diminishing over time. It is less than 0.02 percent in terms of all interest and dividends paid. It is going down.

With new information systems, new computer systems, software, should they be able to diminish that sooner? They have a real incentive to solve their own problems.

I think we in New York and Delaware have a real incentive to try to solve this problem. What we are asking for is to give us a chance to do that.

Mr. CASTLE. Mr. Chairman, would you yield on that point?

This is to make a brief point to the witnesses here. This is from the syllabus that summarizes the case of *Delaware* v. *New York*. Governor Richards mentioned fairness. You mentioned a matter of principle. Senator Hutchison talked about fairness as well.

The Supreme Court's decision states "precedent, efficiency and equity dictate rejection of the second major premise underlying the Master's recommendation, his proposal to locate a corporate debtor in the jurisdiction of its principal domestic and executive offices rather than the State of its incorporation. The mere introduction of any factual controversy over the location of a debtor's principal executive offices needlessly complicates the matter. The arguably arbitrary situation to incorporate in one jurisdiction bears no less on a company's business activities than the equally arbitrary decision to locate its principal offices in another jurisdiction. And there is no inequity in rewarding a State whose laws prove more attractive to firms in which to incorporate."

I think that speaks to the question of fairness, principle, equity. The Court has set it forth.

Governor RICHARDS. Mr. Chairman?

Chairman NEAL. Yes?

Governor RICHARDS. If I may, I think perhaps some clarification of escheat and the courts.

The Supreme Court went on to say that if there were a change to bring about equity, that it was going to be done in the Congress. It specifically cited what had taken place with a Supreme Court decision in 1974. That was when Congress overturned a decision by the Supreme Court. That decision was *Pennsylvania* v. *New York*, which had allocated owner-unknown money order funds to New York simply because Western Union was incorporated in New York.

The Supreme Court determined that New York could keep those funds. Then Congress enacted legislation like the Equitable Escheatment Act that fairly allocated owner-unknown money orders and travelers' checks to all the States in which the funds originated.

So there is certainly precedent that if the Supreme Court, based on current law, makes one decision that the Congress disliked, Congress, in almost a completely parallel situation, overturned that decision.

Governor CARPER. May I respond to that, Mr. Chairman? This is an important point.

I just, frankly, disagree with the presentation of facts by my colleague. There is all the difference in the world between what happened in 1974 with mail order—mail order and what is at stake in this case.

First of all, in 1974, the Congress said this will only be prospective. We are not going to do this retrospective and make it retroactive.

Second, the situation with mail orders—that is, someone bought a mail order and somebody received the value of that mail order at the other end of the line. What the Congress said is that the person who bought the mail order was unable to figure out money doesn't get to the person at the end of the line. Then whatever State was—in which the sender of the mail order was last known to exist, they would get mail order. They would get—that State would receive the value of the money.

In this instance, what we are talking about is we have—in my earlier example, a Delaware corporation owes money. You are the beneficial owner of the stock. You will—I will pay as the Delaware corporation, and you will receive the dividend.

It is not like the money order situation. On the money order situation, nobody received the money. In this instance, you are the beneficial owner. You will receive—if it is a municipal bond you own as a beneficial owner through a New York intermediary, you receive the interest payment. It is entirely different from the money order situation.

The person who was shorted or wronged—if there is somebody—is one of the financial institutions that have not gotten their payment. They have not received their payment or interest payment even though they may be made whole as a beneficial owner. All the difference in the world.

Governor RICHARDS. We are talking about owner-unknown property. We are not talking about the central transaction where you are known to be the owner. We make sure that you get your dividend payment. We make sure the check is in the mail.

We are talking about where owners are unknown. And when those owners are unknown, the present practice is that, because stock is traded in New York State and because companies file their papers of incorporation in Delaware, Delaware and New York say we get to keep all this money where the owner is unknown.

The origination of the stock came from companies that are easily identifiable by their own filing with the SEC, and the State of origination should be the recipient of those unclaimed funds.

Chairman NEAL. I must say I am not clear on this point, either. It has been my understanding that what we are talking about here is funds that are available because the owner is unknown.

Governor RICHARDS. That is right.

Governor CARPER. In this case, Mr. Chairman, the unknown owner is one of these financial institutions.

Chairman NEAL. This is a question of fact that I must say I will have to do a little more research on. It is my understanding that that is not the case. I will certainly follow your advice here and look into it further.

It is my understanding what we are talking about are funds that cannot get to the beneficial owner because that beneficial owner is not known.

Governor CARPER. Mr. Chairman, there will be witnesses following later today. I hope you ask them what is the industry practice. If it is as I have asserted, that the beneficial owner is made whole, I think it puts this whole argument in an entirely different light—in an entirely different light.

Chairman NEAL. Mr. Schumer.

Mr. SCHUMER. I was going to say in some cases it is the one; in some cases, the other.

What Mr. Carper is saying, because so many of these securities are held in street names, it is the financial institution that is ultimately responsible for them and must pay to the other. That is the problem. It is not, you know, that John Smith of Prairie Village, Kansas, died and left no one. They cannot find them. It is that John Smith, before he died, bought the stock, but it was held in the name of Merrill Lynch and Merrill Lynch becomes the party that is responsible.

That is not always the case but often the case.

Governor CARPER. Mr. Schumer, during the last 8 years we did a study of claims paid by New York. Again, owner-unknown—99 percent of the owner-unknowns were financial institutions. I will say this again: 99 percent of the owner-unknowns of that 8-year study were financial institutions.

Chairman NEAL. Governor.

Governor RICHARDS. There has been a question here about the financial costs and how they might suffer losses. The escheat laws in most States—and I submit to you I do not know the specifics of New York or Delaware, but usually the firms get the use of the money where they cannot find the unknown owner. That float goes to people who hold the money.

In this case, it is those financial institutions in New York. So they are compensated and their compensation during that 3- to 5-year period is handsome indeed.

Let us say that it is Merrill Lynch that is the actual owner. Well, then the escheatment of those funds that Merrill Lynch is going to have to turn over should go to the State that is the originator, of that stock through Merrill Lynch.

Chairman NEAL. Mr. Huffington.

Mr. HUFFINGTON. Earlier in the prior conversation, the prior panel, people were saying that the banks located in New York ought to keep them; but banks in New York also own banks in Texas. Banks in New York own banks in California. That line of argument that everything ought to go to New York doesn't make any sense either because, in fact, they have institutions in other States.

As we know, this subcommittee wants to have the opportunity to have banks go across lines from any States. Mr. Chairman, I think there is a fairness principle here. It doesn't make sense whatsoever. I agree with Governor Richards that having all the money stay with three States makes no sense whatsoever.

We have 47 States who disagree. If the States want to solve these problems among themselves, I would think, Governor Richards, you would be saying that you have come to Congress asking us to have a law that will apply to every State.

Governor RICHARDS. That is right.

Mr. HUFFINGTON. I gather that is true for the State of California and other States that are not represented here by their Governors. I think it is incumbent upon us and the Congress to do what is right, to listen to all sides, and then make a decision. After all, this is a democracy. We have 435 Members of Congress, many of whom want to see this legislation passed.

But I think it is good to hear all sides. Perhaps we will hear something new we haven't heard before.

Governor CARPER. May I respond, please?

Mr. HUFFINGTON. Certainly.

Governor CARPER. You just said why should all the money stay in three States? It does not.

If the financial institution—if the financial institution which ends up with a dividend that they really were not entitled to after the beneficial owners were made whole, if that financial institution is a nationally chartered bank headquartered in your State, your State ends up receiving the value of the abandoned property. It doesn't go to Delaware, New York, or Massachusetts.

If a bank is nationally chartered or headquartered in your State, then it goes to your State. These monies—everyone who thinks that somehow the money is going to go to three States is wrong. There are monies that will be escheated this week that will go to your State.

Mr. HUFFINGTON. What if you have a New York bank that has branches, ultimately, not chartered in Texas or California but branches when we do have interstate banking? Where will they go if they are from those banks? Will they go back to New York if it is a New York bank?

Governor CARPER. In Delaware, we have banks owned by Texas banks.

Mr. SCHUMER. Will the gentleman yield?

Is the argument any different where a corporate headquarters is in Kansas but 99 percent of the employees are in California?

Mr. HUFFINGTON. That was my point earlier. If you have manufacturing facilities spread out, if that is true, then if you have banking facilities around the country it should be spread out.

Mr. SCHUMER. If the gentleman will yield.

The bill the gentleman is supporting does not spread it out. It puts it in the State of the corporate headquarters. If the gentleman believes this was such a fair and equitable theory, let him do his own bill and spread it out among where the employees are and where the wealth is.

Mr. HUFFINGTON. Reclaiming my time for a moment, and then I will turn it back to you——

Governor RICHARDS. If I may add a small thing.

Texas did receive some unclaimed property from New York through Texas Commerce Bank as a consequence of our banking association there. In general, however, the unclaimed properties are kept by the banks in New York.

Mr. SCHUMER [presiding]. Ms. Waters.

Ms. WATERS. Mr. Chairman, I would like unanimous consent to submit a statement for the record.

I would like to reserve my comments until you get to a panel where I have to vigorously defend my State.

[The prepared statement of Ms. Waters can be found in the appendix.]

Mr. SCHUMER. You have done a very good job of that in many instances in the last few months, Ms. Waters.

I have a few questions.

First, thank you for coming, Mr. Carper. You are being defended very well on this subcommittee by both your predecessor and your successor. Governor, now Congressman Castle.

I want to thank you, Governor Richards. I admire very much your speeches, particularly at the convention where you noted that George Bush was born on third base. It didn't mean he hit a triple. Now you are on third base. Have sympathy for those of us starting out at home plate. There are only three of us.

Let me first say you are correct—let's talk about prospective now—you are correct. Escheatment law goes to the debtor. When the Supreme Court decided the case of *New York* v. *Delaware*, do you remember who they said the debtor was?

Governor RICHARDS. I am sorry, no.

Mr. SCHUMER. I didn't think so. The debtor is not the taxpayer of your State whom you have been talking about as the debtor. The debtor—and this is the point Mr. Carper has been saying—escheatment law in the 50 States says the money goes to the debtor. The debtor, according to the Supreme Court case, is the financial firm that held the stock in street name. In fact, the people who issued the municipal bonds of the corporation are not the debtor. That is the very basis of the Supreme Court decision.

All we were saying is if you believe that, which you do, and it is what the law of Texas says and it is what the law of the other 49 States say, all of a sudden you are changing the law around because it so happens there are 3 States versus 47. There is no integrity to the position. I hope people understand that.

The debtor has been and is—by what every lawyer has stated—forget the lawyers—what the U.S. Supreme Court has said—is the financial institution.

So can you tell me why in this case it shouldn't be the debtor but should be something else when your State and all the other 49 States say the debtor should get the money?

Governor RICHARDS. First, let me tell you, Congressman Schumer, that I usually don't use sports metaphors when it comes to describing situations and people. As much as I would like to take credit for the third base comment, I didn't make it.

Mr. SCHUMER. Well—who did? Just so we can clarify the record?

Governor RICHARDS. I am really not sure. I have heard it said about a lot of people, Congressman.

Mr. SCHUMER. OK. Please answer the question.

Governor RICHARDS. The Supreme Court did indeed cite the debtor, and the Supreme Court at the same time pointed out, when there were disputes between States, that one of the places where those disputes were resolved was in the U.S. Congress.

It cited specifically an escheatment act that is very much like what is transpiring here today that took place in 1974. There may be some differences; but, essentially, the argument and the issue were the same.

In that case, the U.S. Congress acted, and in this case I hope very much that it will do the same, and in that enactment Congress overturned a decision made by the Supreme Court.

Mr. SCHUMER. Thank you. You lead me to my next question. I don't think it applies, but if you agree with the 1974 act, do you agree with the fact it was just prospective? They didn't make it retroactive?

Governor RICHARDS. That is right. The only retroactivity that I am aware of is when the State of Delaware sued the State of New York, and the State of New York was required to retroactively pay Delaware.

Mr. SCHUMER. You don't like retroactive types then?

Governor RICHARDS. That is right.

Mr. SCHUMER. Why are you supporting this bill whose whole basis is retroactivity back 40 years?

Governor RICHARDS. I thought I explained in the area of escheat, unlike anything else, the law requires that the States hold this money in perpetuity for the person who has the highest claim. And because the States are the holders of the money in trust—they are not the owners of the money; then the retroactivity, as required in this legislation, is different simply because the field of play is different.

Mr. SCHUMER. Would you support legislation that was prospective only?

Governor RICHARDS. I think that there have been discussions, Mr. Schumer, of that nature. I cannot speak for the other 46 States involved in this. But I think that it certainly is a matter for discussion.

Mr. SCHUMER. Thank you.

You know, I am a little confused. Somehow, this bill makes you depart from principles that you state. First principle, it ought to go—I mean, this is not a moral principle but just a principle that you stated when you came here—it ought to go to the debtor but not in the case of owner-unknown escheats.

Second principle, we ought not to do retroactivity except in this legislation. It makes me feel that, rather than principles, this legislation is a little bit of opportunism because you said a minute ago you don't like retroactivity. The 1974 case was decided correctly. But all of a sudden, just for the arcane law of escheatment, which you don't want to follow on the principle of the debtor getting the money, all of a sudden retroactivity should be—forget it.

Governor RICHARDS. It is important that I represent the people and the taxpayers of the State of Texas. I am doing that in good faith this morning. And I am sure that you recognize that. People in Texas work just as hard for their money as the people of any other State, including Delaware and New York.

This is not personal nor is it unprincipled. It is those of us who are in positions of leadership representing the people that elected us to speak for them when we think that they have been wronged. In this case, we believe that that is true.

Mr. SCHUMER. Governor, I think that we could make that argument on a variety of 500 bills——

Governor RICHARDS. I am sure that you could.

Mr. SCHUMER. That take money from a few States and give it to all the States. And, somehow, to avoid that kind of maelstrom and to avoid that kind of situation—because in all my years here, 14, I have never seen—the reason I am so upset about legislation like this is in part because it affects my State, obviously, but in part because I have never seen a bill like this. I have never seen a bill that departs from basic principle and simply says, here is some money. Let's go grab it because we are 47 and they are 3.

So I understand that you want to represent the people of your State. But I would say to you that those of us here in Congress who are going to have to deal with other laws like this in the future or deal—a great deal of arguments were made on this floor about the S&L buyout. Texas made the mistakes, and Texas got most of the money. Many of us resisted that argument.

I would say to the treasurer of California, a few weeks ago lots of people said why we are giving so much money to California when it comes from all the other States because of the flood? To me, this is the inverse. And I supported both. I supported the S&L situation. I supported sending the flood money to California.

But all of a sudden it seems to me that the rules change. And now we have to say, let's just support not what is in the national interest, not what is governed by some overriding principles, but what is good simply for the people of my particular State.

That is your job as Governor of Texas. I don't begrudge you that. But I would say to my colleagues here that if we simply do that we would not have a Congress. We would have 50 separate countries almost. And that is my basic problem.

Governor RICHARDS. Congressman Schumer, this issue is not a contest over Federal money. This issue is a contest between States of originators of money. When you talk about the recipients of Federal funds, all of us in the States are very grateful when you recognize that we have problems and need your help.

The State of Texas receives—I believe it is 47th among the States in per capita in the amount of money it receives in grants from the Federal Government. The argument that somehow one State or the other has received some largess from the Federal Government is not applicable in this case. It is not applicable to Texas nor is it applicable to the issue at hand.

And, respectfully, sir, I have to get a plane so I can go home. I would stay here a long time.

Mr. SCHUMER. May I ask you just one other question? I know that you have to hurry.

Each State thinks they are 47th in the amount. Our Senator does the analysis that shows that we are at the bottom. My question is, would you support an amendment to this legislation that banned the contingency fee when we passed legislation similar to the legislation that you signed as Governor of Texas? I know Texas does not have an agreement with the lawyers here.

Governor RICHARDS. No, sir, I don't. And so I listened to all of that argument this morning, and it didn't fit Texas, and I would certainly support the attorney general who does represent us in whatever accommodation he determines is in the best interest of Texas on this legislation.

Mr. SCHUMER. But, in principle, would you support legislation as you did in Texas that federally——

Governor RICHARDS. I would leave that entirely to the attorney general because he has represented us on this legislation very well.

Mr. SCHUMER. Thank you, Governor. Thank you for being here.

Mr. Neal is taking the chair, and I guess the Governor has to leave.

Chairman NEAL [presiding]. I understand Governor Richards has to leave, and I want to thank her for appearing this morning. Thank you very much for being with us.

Let me say that it is the intent of these hearings to get at the truth of these issues. And certainly, so far as I am concerned, we won't decide this issue based on a matter of who can try to stick it most to the other States. That is not the purpose of these hearings. The purpose is to try to get at the facts.

And, personally, I don't feel that I am comfortable with the facts at all. And that is one of the reasons why we called the hearings. So we hope that, ultimately, this issue will be settled on the basis of fact and equity and so on and not on raw political power.

Ms. WATERS. Will the gentleman yield?

Chairman NEAL. Yes, I believe that you would be the next. I was out of the room.

Who was the last person?

Then, excuse me, I will come back to you.

Ms. WATERS. Thank you, Mr. Chairman.

Chairman NEAL. I will call on Mr. Bachus.

Mr. BACHUS. I am going to submit a statement for the record, if I could, with unanimous consent.

Chairman NEAL. I am sorry. I didn't hear the question.

Mr. BACHUS. I ask unanimous consent to submit my statement for the record.

Chairman NEAL. Without objection.

[The prepared statement of Mr. Bachus can be found in the appendix.]

Mr. FLAKE. I am conducting a hearing in another room, and I would like unanimous consent to submit my statement for the record and to be on record as supportive of protecting the rights of New York and Delaware, my friend, Governor Carper, who shared with us 6 years on this subcommittee together. We have dealt with this issue in the past, I think for two terms that he was here at least.

And, of course, I am a native Texan so I would hate to be against my Governor and would hope that she would allow me back in the State when I have to go and visit my family.

Chairman NEAL. Thank you.

Ms. Waters.

Ms. WATERS. Thank you, Mr. Chairman.

Obviously, the heated debate that we find ourselves in is a debate that certainly indicates all of our concerns for our States and our respective communities. However, I think it would be a mistake to assume that we are all absolutely cast in concrete on the measure as it is presented.

I think, Mr. Chairman, you are absolutely correct that this is what Congress is all about, and I think this what the subcommittee process is all about.

We have an issue here. It is an issue that has to do with a dispute between the States. And we certainly are within our jurisdictions and our work to hear this matter.

I think Mr. Schumer should know that I have not decided that retroactivity is the answer here. And I think you challenged me when we first talked about this issue, and you raised the legitimate question of whether or not I would want to do anything that would cause great harm to any State—New York. And certainly I don't think that is the intent of most of us to do that.

I am delighted that we have these hearings so that we can talk through these issues, but I am not at all sure that the answer is total retroactivity. I think that most States are hurting and that none of us are flush with money anywhere. And just because we need it in California or just because we feel there is a fairness question here, should any of us conclude that the absolute answer is something in line with complete and total retroactivity?

So, I would hope that you would know that, while I wanted the hearing to go forward, that that certainly is not my——

Mr. SCHUMER. Will the gentlelady yield?

Ms. WATERS. Yes, I will yield to the gentleman.

Mr. SCHUMER. And let me first say that she has been, you know, a firm advocate for her State and her community; one of the best advocates a State could have.

And I very much appreciate what you are saying, the fact that the people who support the bill may not necessarily support retroactivity is a hopeful sign.

And, as you say, just as you had severe damage, natural damage from earthquake, certainly a retroactivity bill, a prospective bill, would hurt us because it would do the same kind of fiscal damage to our State that an earthquake did to yours or a hurricane to Florida, and I appreciate the gentlelady's compassion in understanding that.

Chairman NEAL. Mr. Klein, a member of the subcommittee, and then Mr. Castle. Mr. Klein.

Mr. KLEIN. Thank you, Mr. Chairman.

I am not quite sure where we are at the hearing, but I did want to—are we on questioning or members' comment?

Chairman NEAL. Yes, you are welcomed to question our witness.

Mr. KLEIN. I simply came down here because I wanted to hear particularly Judge Gibbons and other witnesses from New Jersey, and I wanted to welcome Judge Gibbons and Mr. O'Connell, both of whom are from New Jersey.

And I also wanted to express the point of view of those of us from New Jersey who I think suffer from the inequities of the escheat going to institutions in a single State and depriving the citizens of

New Jersey of the benefits of escheats, which I think are generated by New Jersey-based persons.

While I have heard some of the concerns that have been expressed by Mr. Schumer and other Members of the New York delegation—and certainly I say to my good friend, Mr. Schumer, it is not our desire to hurt New York—I do think there is a clear need for more equity than exists in the present situation. And I would hope that out of this hearing we can devise a plan that will achieve that equity and at the same time do so without causing undue pain or burden on the citizens of the State of New York.

Chairman NEAL. Thank you, sir.

Mr. Castle.

Mr. CASTLE. Thank you very much, Mr. Chairman.

I haven't had a chance to welcome Governor Carper here. And, obviously, we are longstanding friends who managed to change positions. Our names being so similar, people confuse us.

When you told that story of reaching for your voting card, I almost gave you mine. We appreciate your work.

I notice that Charlie Oberly is here, too, and the three of us have put a lot of hours in this particular issue, which I came into this room believing that it was a fair decision. I am even now surer that it was a fair decision. And I am surer than ever that the retroactivity part of this is an absolute legal and constitutional disaster, and the time has come to sever that at once. That doesn't state that the rest of it is not also problematic as far as legal and constitutionality is concerned, but that is a particular problem for me.

I am sorry I didn't get a chance to ask Governor Richards and Senator Hutchison questions. I can follow them with written questions.

They talked about fairness. They talked about the equity of this circumstance. And I think that concerns each and every one of us.

Do you know—and I wanted to ask Governor Richards this: I don't know the exact percentage, but I understand that the percentage of these kinds of owner-unknown, unidentified types of escheatments involving municipal bonds is minuscule. It is a tiny part.

Governor CARPER. That is correct. I don't know what the percentage is, but it is very small. The percentage of owner-escheatable funds are from dividends from stocks.

Mr. CASTLE. And 99 percent are from funds, and I think this is important that the chairman understands this because he is the one who has to make decisions, and I think this whole case has been misrepresented from the advocates of it from the beginning.

The time has come to make sure that the facts are on the table, and I agree with the chairman, I don't care how long it takes.

We need to make sure that everyone understands what the facts of this case really are, and it is my understanding that, basically, when the issuer of the stock has delivered the dividend or interest payment or whatever it may be to the financial institution which is going to manage it, they then enter into negotiations with other financial institutions. And, basically, these are debits and credits between these financial institutions. It has nothing to do at this point with the issuer. It has all to do with the financial institutions which are holding it.

The only argument, really, is between New York and Delaware and Massachusetts, perhaps, in terms of whether it is the State where they are incorporated or the State where they are doing business. And that virtually is 99 percent or maybe more of all the dollars involved.

It doesn't involve the corporations themselves because they have already paid that money over. Am I stating that correctly? Refine it, if you will, for us.

Governor CARPER. We conducted an 8-year study focusing on New York to see how prevalent was the occurrence of the owner-unknown situation that involved financial institutions. Ninety-nine percent of the cases involved financial institutions.

Now when the Supreme Court issued their decision last year, they decided that this longstanding current practice should be affirmed. They said it should be affirmed because it is consistent with precedent, because in the Court's view it is fair, and in the Court's view it is an efficient way to handle this.

If 99 percent of the owner-unknown did not involve financial institutions, maybe the Court would have had a different view. If the beneficial owner of these transactions was not may-hold as practiced by the industry, perhaps the Supreme Court would have had a different way.

The beneficial owners are may-hold. The issuer of the stock has an obligation to pay. Why should the issuer of the stock or the bond get the money back or the State get the money back? It makes no sense at all.

Mr. CASTLE. One other request. It has also been discussed whether or not negotiations—and the fact that we are dealing with this issue in a retroactive sense just amazes me. But, having said that, I understand that negotiations between the States are ongoing. Delaware and New York had to resolve their differences, which they have, and they are now dealing with other States as best they can. There is some disagreement about that because of the methodology of the negotiations.

Can you share with us what you know about the ongoing negotiation for settlements amongst the States?

Governor CARPER. I believe an attorney for New York State—it may have been Mr. Miller—an attorney for New York may have sent us a letter that could have been shared, I think, with the members of this subcommittee that indicated that off-of-the-record discussions have begun.

And I just think it is important for—the Congress should be sort of the avenue of last resort, be the first. Let us go forward with the negotiations. They have begun. We will negotiate in good faith. You know, I think, me and the way I like to work, and I have said we are going to negotiate in good faith, and we are.

Chairman NEAL. Will the gentleman yield?

It is my understanding that the negotiations between New York and Delaware are going on just fine.

Governor CARPER. They have been concluded as of 2 months ago. They have been concluded. And the letter I think is probably in the hands of the subcommittee now—from the New York's attorney has indicated that negotiations have already begun with other States.

Chairman NEAL. What would the incentive be for New York to negotiate seriously with other States? Why would New York want to do that?

Governor CARPER. One is, to not invite the passage of this bill. You know, that would be—if I were the folks on the other side of this battle, the proponents of H.R. 2443, what I would like to have is a negotiating tool, is—I would like to have this bill on the suspension calendar of the House of Representatives.

And then to sit down at the negotiating table with New York and Delaware and the other States and say, let's sit down and negotiate, and New York to face literally the loss of billions of dollars and Delaware the loss of hundreds of millions of dollars. That is what they are trying to do.

Chairman NEAL. In absence of this bill, what incentive would there be for New York to negotiate?

Governor CARPER. I think, given the fact that the current practice is consistent with precedent, that it is fair and efficient. I think there is relatively little incentive or motivation.

Chairman NEAL. So, it is at least understandable why this bill has 300 and something cosponsors.

Governor CARPER. Every State would like to have more money. And in this case 47 States would like to have more money at the expense of 3.

Chairman NEAL. You said that the Supreme Court rules in prior cases—that is, you said that in *Delaware* v. *New York* they endorsed the prior precedent. But didn't the Court also invite the States to seek action by Congress regarding future equity, future law?

Governor CARPER. The Court flatly rejected the premise, the theory, on which H.R. 2443 is built, that the money somehow enured to the State in which it was issued. The Court said that is wrongheaded and unfair.

What the Court did say was that if the Congress wants to change the law they can change the law, but this has been the law and the interpretation and the application of the laws for tens of years—for decades.

Chairman NEAL. I take your point, and I understand that that is correct, that they did agree with the current situation.

But they also said that if the States are dissatisfied they may air their grievances before Congress. That body may allocate abandoned property among the States without regard to this Court's interstate escheat rules.

Governor CARPER. The Court could say that about a lot of decisions that they make.

Chairman NEAL. But there is no argument about this.

Governor CARPER. But the Court specifically considered whether or not the abandoned properties, the escheatable funds should inure back to the State in which it is located, and the Court rejected it outright.

Mr. SCHUMER. I would say, Mr. Chairman, that you are correct, but it wasn't an invitation. It wasn't that the Court said they can't solve this problem. They were stating the fact that, prospectively, that if the Congress itself wanted to overrule what had existed for a very long time in terms of the common law of escheatment, that was their right to do so. It would then be, you know—depending on what would happen, it would then possibly be litigated if they did it in a way that comported with the standards of due process.

But, certainly, the States have—I mean, the Congress has a right to come in.

I would say one other point in regard to the States negotiating. As I understand it, my State and Delaware have sought to negotiate with the other States, but they are not getting too far because there is a view, particularly among some of the lawyers and others, who are saying, no, let's pass this bill, and let's not bother to negotiate. And that is what has been happening so far.

There is an interchange of letters which I don't think is worthy of submitting to the record, but I will share with you, of the New York's lawyers writing to some of the other lawyers saying, we want to negotiate. Don't tell them that we don't. We do. But the lawyers for the other States were saying that, no, New York doesn't want and Delaware doesn't want to negotiate.

Let me declare for the record here incontrovertibly that, of course, we want to negotiate. Nobody wants to have a bill and all of that go though, and go through all of this litigation. Like anything else, people want the issue settled in as fair a way as possible.

Mr. KLEIN. Will the gentleman yield?

I am listening to the comments of the good Governor and my good friend, Mr. Schumer. It seems to me the issue is not what the phraseology of the Supreme Court might be, but, rather, whether Congress has a right to act in this manner. And then the question becomes what is fair and equitable?

And it seems to me it is not fair and equitable for two or three States to be the sole beneficiaries of these escheats. I think they just as much belong to the citizens of other States as they do to the citizens of New York and Delaware and Massachusetts.

With regard to the subject of negotiation, if the States can negotiate an agreement, that would be all well and good. But I haven't heard anybody say what the proposal is. I heard the Governor of Delaware saying not very much.

Governor CARPER. Mr. Klein, had you been able to join us a bit earlier, you would have heard all 50 States stand to realize some—should realize today escheatable funds from the financial institutions that are headquartered or chartered in their own State. They already do. Your State does. My State does. It is not as if there are only three States who receive escheatable funds from their financial institutions. It happens in every State, and it happens every week.

Mr. KLEIN. I am very much aware of that, Governor, but the point is that there is a category of escheatable funds that seems to be concentrated in the few States. And that category of funds equitably doesn't belong just to those three States. There should be a more equitable distribution, and that is the thrust of this legislation.

Chairman NEAL. May I just suggest for a moment—we had offered Mr. Castle some time. I don't know if he has completed his line of questioning or not. In any case, may I suggest that we try to wrap this up pretty soon and move on to the other panel? We have three other panels. And, having said that, I don't want to cut off anyone else.

Mr. SCHUMER. I wanted to make two points.

One point is that this legislation is retroactive. We feel that is unconstitutional.

Mr. KLEIN. I understand that.

Mr. SCHUMER. Second, if you read the Supreme Court decision of *New York* v. *Delaware*, they said that the method that had been used for the last long number of years—I don't know how long. I don't know when all of this started—was the fairest and most equitable way based on common law practice.

It is simply not—you know, you could say that everything that is done should be distributed on a per-capita basis, and that is the fairest way to go, but we don't do that except in very rare situations. So I would just ask the gentleman to read the decision and see if he agrees with it.

But just to say, ipso facto, it is not fair for 3 States to get 47 is not a fair reading of what is going on in my judgment because, first, as the Governor said, it goes to all the States, some in greater numbers than others. But, second, if you look at what is fair in terms of how the law of escheatment has worked, the system that it has been going on is the fairest one, in my judgment. It is not simply an issue of 3 versus 47.

As I mentioned before the gentleman came, any of us could come up with legislation that redistributes money from the given 3 States to another 47, and that is not how we should be guided here in Congress.

Chairman NEAL. Mr. Castle.

Mr. CASTLE. Just a brief statement that the Governor is free to comment on.

The case does talk about a legislative solution. It mentions that as a possibility there, however, it is clear as a bell that a legislative solution cannot in and of itself be unconstitutional. And there is no doubt in the minds of any lawyers I have talked to who have examined this that H.R. 2443, which would give the escheat authority to the State with no nexus at all, would run afoul of the due process laws of the Constitution. It unconstitutional retroactively or prospectively.

It is for that reason that we have these flaws and why we have to establish these facts, the legal precedents behind it, and go forward from there.

Chairman NEAL. Governor, thank you, sir, for being with us today. It is always a pleasure to see you, and I appreciate your thoughtful comments.

Governor CARPER. Thank you.

Chairman NEAL. Our next panel is comprised of the Honorable Michael Easley, the attorney general of the State of North Carolina; the Honorable G. Oliver Koppell, attorney general of the State of New York, accompanied by the Honorable Jerry Boone, New York solicitor general; and John J. Gibbons, Richard J. Hughes professor of constitutional law, Seton Hall Law School.

I would like to welcome this panel, and I would also like to welcome my fellow North Carolinian, Mike Easley. He is one of our outstanding citizens, and it is a pleasure to have him here with us today.

Without objection, your entire statements will be placed in the record. I would like to urge you to keep your summaries brief so that we would have some time for questions and answers.

If there is no objection, we will hear from folks in the order in which I called them. And, hearing none, we will recognize Mr. Easley.

STATEMENT OF HON. MICHAEL EASLEY, ATTORNEY GENERAL, STATE OF NORTH CAROLINA

Mr. EASLEY. Thank you, Mr. Chairman.

Let me say, as a fellow North Carolinian, that it is an honor indeed to appear before your subcommittee. I regret that, having served us so well in North Carolina, that you elected not to run for reelection, but at least I have the honor of appearing before this subcommittee before you do go back to North Carolina.

I appear before you as your attorney general in strong support of H.R. 2443, the Equitable Escheatment Act. The unclaimed securities distributions are paid by taxpayers and companies headquartered all over the country and currently being divided by three States. We have heard pretty much that that $1 billion is going to be divided mostly by New York and Delaware and maybe $40 or $50 million going to Massachusetts.

What this bill would do is prevent that inequitable outcome and ensure that all States recover distributions that originated within their borders.

The bill must be enacted, Mr. Chairman, before the Special Master makes his final recommendation and the Supreme Court enters a final judgment. This could occur in the next 60 to 90 days. This is important because it would be unconstitutional to enact a retroactive bill after a final judgment, and the final judgment would probably be entered, as I say, in the next 60 to 90 days.

So if this subcommittee does not act quickly then the issue will be moot, and there will be no need to act at all.

Let me add, too, that the other 47 States right now collectively receive about $2 million of that $1 billion. The Court in the decision that has been talked about—and I am not going to go into it in detail unless you want to ask me specifically—but it did invite legislation.

It states, and I quote, "if the States are dissatisfied with the outcome in this particular case, they may air their grievances before Congress, which may reallocate abandoned property among the States without regard to this Court's interstate escheat rules."

That is rare for the Court to do that, to invite legislation. The Court referred to the 1974 legislation which overrode the Court's decision in a similar case, *Pennsylvania* v. *New York* again. That decision gave the same type property owner unknown or unclaimed money order funds to one State—to New York.

The Court stated that Congress may ultimately settle this dispute—this one we are talking about here today—through similar legislation that it did in the *Pennsylvania* case which was—and I will get to this more—retroactive in many respects. It was retroactive to all of the money except that covered by the final judgment, back to 1965.

It is appropriate for Congress to address this issue, Mr. Chairman. Some opponents of the legislation have argued it is inappropriate to do so. They failed to state that the law is clear and fair with respect to other types of unclaimed intangible property. It is just where you get this third party—what I call middleman, the conduit—involved that it becomes confused.

And that is all we are asking you to address. That is what was addressed in the *Pennsylvania* case when Western Union was the third-party middleman. That is what we are asking you to address in this legislation as well.

This addresses the unusual or atypical case where the conduit is there, and, absent legislation, neither the State of the originator nor creator of the property or the State of the intended recipient receives anything by escheatment, because it all goes to the State of incorporation of the middleman or the conduit which are your brokerage firms and banks. The legislation conforms treatment of other unclaimed property to treatment of securities, and that is what we think is fair and equitable.

Unless this bill is enacted, three States, which are neither the originator nor the owner of the property, will escheat these funds merely because they are the States in which conduit intermediaries or middlemen happen to be incorporated.

Legislative action is needed. And I find particularly ironic that they now say this action is inappropriate when the attorneys for Delaware and New York argued before the Supreme Court that if this was to be changed Congress ought to do it. And I quote, New York stated: "Congress has the ability, should it be unsatisfied with application of the Supreme Court's basic rules in this area to a particular type of transaction, to change the rule with respect to that kind of transaction." Saying the Court should not and Congress should, it would be changed.

Delaware agreed and said that the escheat rule ought to be implemented by Congress in making the exception to the rules as it did in the money order situation, rather than by this Court. And I am quoting Delaware.

And I think the courts somewhat agreed by basically—what they said is we can't settle every dispute. If you want it changed, go to Congress.

Let me touch on the fairness and hardship we have heard about from New York. The Special Master addressed that and considered the fairness and hardship objections requiring New York to disgorge the funds it has taken, and he rejected it. He claimed that New York's purported hardship represented a calculated risk New York has imposed on itself and not just an unfair surprise or burden.

And I point out that in 5 years 47 States have attempted to recover from New York the funds it unfairly seized. Equity supports our claim to those funds, and the Constitution creates no bar to this bill achieving that result because there is no final judgment. New York was put on notice earlier than 1988, and I will be happy to go into that in detail, that these were being contested.

The dispute over those funds is ongoing. The Supreme Court remanded the matter back to the Special Master for further proceedings, and no final judgment has been entered in the case. And it is constitutional for the legislation to apply to distributions seized by New York. And I reiterate that it is imminent that there will be final judgment.

Let me speak to retroactivity because there has been some discussion about it, and I will try to sum up.

Unlike the present case where no final judgment has been entered in this case, Congress could not apply the 1974 money order statute to funds New York had already seized because the Supreme Court entered a final judgment as it related to those funds. So when Congress enacted the legislation to change the way the funds were escheated, they had to do it only with those funds that were not covered by the order of the Court, the final order of the Court or the final judgment.

There was no constitutional bar, however, to the retroactive application of the 1974 money order statute to funds which the final judgment did not reach, not covered by the final judgment.

So what they basically did was enacted the statute in 1974. The judgment was in 1976 and the statute was in 1974. That was retroactive and let the States go back and escheat that property that New York had not yet escheated that was available to be escheated by other States, let them go back to 1965 which was as far back as you could go with the money orders. And I think it is important that we understand that that precedent was set then.

And also I want you to know there are no good-faith settlement offers at this time. There have been no good-faith settlement attempts, in my opinion. More than 9 months ago, 47 States made a settlement proposal to New York and Delaware involving specific funds and specific amounts that counsel for New York and Delaware never responded to that proposal. When counsel for New York and Delaware finally asked for a settlement meeting in February, they put forward only a series of outrageous preconditions that are completely absurd.

New York has rejected the 47 States' offer which you know by now was $250 million, and says, quote, the notion that New York should agree to pay other States anything is rejected.

It is clear, I think, Mr. Chairman, beyond any doubt, that New York and Delaware will be motivated only by dramatic legislative progress. And if it doesn't happen quickly then we won't have a chance to settle this matter at all.

Thank you.

[The prepared statement of Mr. Easley can be found in the appendix.]

Chairman NEAL. Thank you, sir, very much.

Mr. Koppell.

STATEMENT HON. G. OLIVER KOPPELL, ATTORNEY GENERAL, STATE OF NEW YORK; ACCOMPANIED BY HON. JERRY BOONE, NEW YORK SOLICITOR GENERAL

Mr. KOPPELL. Thank you, Mr. Chairman and members of the subcommittee. It is an honor and a pleasure for me to testify here before you this morning, my first opportunity as the new attorney general of the State of New York.

And it is a pleasure to see my friend and former colleague from the State legislature where we served together for many years, Congressman Schumer, here as well, and I appreciate his strong advocacy.

I am joined by the solicitor general of the State of New York, Jerry Boone, who has been familiar with this matter and litigation on this matter for many years, and also by Judge John Gibbons, who is actually retained by the State of Delaware and who will discuss with a greater familiarity some of the constitutional issues involved here.

My statement, I know, is in the record, and let me try and be as brief as I can and discuss two of the key issues that are before you.

First, with respect to the issue of retroactivity, while there may not have been a final judgment issued here, I would like to explain for you, Chairman Neal, and for the record that, in essence, the rights of the parties have been determined by the Supreme Court.

The matter was referred back to the Special Master to determine the details, including the possibility, which is real, that some of the other 47 States involved here will get some monies in the litigation, having nothing to do with action by the Congress. The other 47 States have claims against New York which may give them a small recovery, and those are now being negotiated. And part of the negotiations that are ongoing is within the parameters of the litigation itself.

But the principal rights of the parties have been determined, and most of the money that New York had goes to New York, Delaware, and Massachusetts, and a small amount may go to the other 47 States, and a Special Master is in the process of sorting all of that out. And once that is all sorted out, I suppose that is when the final judgment will be entered.

Now, looking at whether it is equitable, whether it is fair to go retroactively, I kind of looked at it in terms of a simple example. I took the first letters of the names I am using from the States. Nancy is New York, Debbie is Delaware, and Wendy is Wyoming because Mr. Thomas is the first one who raised this issue.

Assume for a moment that Nancy has $1,000, and Debbie sued and says, under law, I am entitled to $200 of that, and there is a lawsuit between them. And then Wendy comes in and says, no, I am entitled to $400 or $500. And the Court makes a decision and says, of the $1,000, $200 goes to Debbie, and none goes to Wendy.

And that is the way we determined the law was with respect to the transactions between these three people over the past 20 years. Nancy has the whole $1,000. The Court says, no, Nancy. You are not entitled to the whole $1,000. You have to give $200 to Debbie, but Wendy is not entitled to any.

And then Wendy comes to the Congress of the United States and says, whatever the rights of the parties were in the past, we want to change that, and we want to now provide that Nancy gets $500, Debbie gets $100, and $400 goes to Wendy.

The fact of the matter is that there has been a decision as to what the law was under which the parties operated. We do not deny that the Supreme Court decided that our decision to escheat all of these funds was contrary to what the law was, and that is why we made a settlement with the State of Delaware because we recognized that we did something that ultimately was determined not to be entirely supportable under the law.

But to now say that we will retroactively change the law, going back 20 years, because Wendy lost, any principle of fairness just simply does not admit that that can take place.

So with respect to the argument of retroactivity, that this should be done retroactively, certainly from the point of view of fairness—and we would argue further, and Judge Gibbons is going to talk about this further—in terms of the constitutionality of going retroactively, from any view of fairness to say, after a Court has looked at this very carefully and studied the precedents and decided that as between New York and Delaware it should go this way and the other States have a relatively small recovery, now for the Congress to come in and say, no, no, no, we are going to change it retroactively and change it in such a way that it contravenes what the highest court of the land has deemed the law to be, that I believe is unfair. I also believe it to be unconstitutional.

Now look prospectively for a moment and see whether the rule that the Court reaffirmed makes any sense or whether there should be some other rule, because Governor Richards has argued that there should be some other rule as a matter of fairness.

Here is another example. Imagine for a moment that Mr. Boone here is my uncle, and I decide to go on a long trip and—well, someone owes me money. Say Judge Gibbons owes me money. And I say to Judge Gibbons, judge, I am going to be away for a long time so I would like you to pay the money that you owe me to my uncle, Mr. Boone. And our agreement is that he will safeguard that money for me and give it to me when I get back.

Well, I never come back. Now, Judge Gibbons gave Mr. Boone the money for me, it is true. And I don't get the money. Now, between the two of them, which is it more equitable to keep the money? Judge Gibbons owed me the money, and he paid it to Mr. Boone. Why should he get the money back? Now, if I am around, certainly I should get the money, but as between Mr. Boone and Judge Gibbons it seems to me it is clear it goes to Mr. Boone, my uncle. He stood in my shoes.

Where it is the New York brokerage house or bank that has the money and is the debtor, and New York says we owe money, and we can't find the person you owe it to, then it goes to the State of New York.

Or if Merrill Lynch is the uncle in the case of the financial transaction. It is the State of Merrill Lynch that ought to get the money.

New York took the position that the State of Merrill Lynch was New York because that is where Merrill Lynch has its offices. The Supreme Court disagreed. They said, the State of Merrill Lynch is the State in which Merrill Lynch is incorporated. We weren't happy with that, but that was the decision of the Supreme Court.

It seems equitable to say it is the State of incorporation. Is it equitable to say that it is the State where the principal executive office is? Well, as I think Mr. Castle pointed out so well, that is hardly the fairest. I mean, the Pennsylvania Steel Co., that Governor

Richards spoke about may well have their principal executive office in the big city of New York, because many steel companies do have their principal offices in New York.

Take Xerox Corp. Xerox moved its principal executive offices to Stanford, Connecticut, but the biggest number of Xerox employees are in the city of Rochester in New York. Is it fair as between Connecticut and New York for these monies—for the Xerox monies, if you want to call it that, to go to Connecticut rather than New York where Xerox was founded and where most of its business is done? That doesn't make any sense to me at all. You could pick a lot of different nexuses, but the one—principal executive office—is probably the least sensible.

Furthermore, you can move your executive offices around a lot, and a lot of companies do, and every time a company merges they move their executive office around. The paperwork burden on the bankers and banks—and I think they are going to talk about this—is going to be incredible. You could have the principal executive office moved three times in the same year, and this is for thousands and thousands of companies. How are you going to sort this all out? It creates an incredible burden.

So, as far as I am concerned, as I said before on retroactivity, I don't think there can be any argument that it is unfair and unconstitutional to go backward. But, even going prospectively, to have a rule that says that it is the debtor's money so it is the State of the debtor that gets the money is an eminently fair rule.

Furthermore, the Governor of Delaware was absolutely correct, Chairman Neal—and I know you asked questions about this—that the reason that this money doesn't get claimed is it gets mixed up between different financial institutions. For the most part, the beneficiary of the money, the person who actually owned the stock or the bond, gets paid, and it is the small number of financial transactions—out of millions and millions of transactions, involving billions and billions of dollars—which gets mixed up between the various financial institutions.

You can go back to my analogy. If Uncle Boone here doesn't do his bookkeeping right and that is why we can't trace where the money went and it is still in his account, it should go to Uncle Boone's State. It shouldn't go back to Judge Gibbon's State because he owed the money and has paid it and is out of the picture.

So, again, it makes eminent sense for the State of the debtor to get the money. Furthermore, it is very likely that that is, ultimately, if you will, where the money was lost or abandoned.

Now going just for a moment to the Pennsylvania precedent, Attorney General Easley admitted that to the extent it was retroactive, the law that was passed after the *Pennsylvania* v. *New York* decision was only retroactive with respect to funds that had not yet escheated. Here we are talking about escheated funds. And I don't think that the precedent of that legislation dictates that, in fact, you can go retroactive.

Last, let me refer to the Court's reference to coming to Congress. Certainly, the Court allowed Congress could act here, but I believe again it was Representative Castle who absolutely correctly pointed out that, while Congress may be able to act—and I agree with Congressman Schumer that Congress can act here—it can only act within parameters, and must respect the due process rights of the parties here.

And I would suggest to you—and I am going to now yield to Judge Gibbons—that the proposed changes incorporated in H.R. 2443, even if only applied prospectively, violate basic constitutional principles, and that we not only have a problem with H.R. 2443 retroactively but we have a serious problem prospectively.

Let me finally conclude by saying negotiations are under way within the parameters of the existing litigation which is still not finalized. We are still before the Master. And if those negotiations can resolve this matter satisfactorily with respect to both past liabilities and future obligations, New York is certainly interested in that result, and I know that Delaware and Massachusetts would be as well.

Judge Gibbons.

[The prepared statement of Mr. Koppell can be found in the appendix.]

Mr. GIBBONS. Thank you, sir.

Chairman NEAL. Mr. Boone, did you want to add to this?

Mr. BOONE. No, I am here accompanying our chief legal officer as a resource.

STATEMENT OF JOHN J. GIBBONS, RICHARD J. HUGHES PROFESSOR OF CONSTITUTIONAL LAW, SETON HALL LAW SCHOOL

Mr. GIBBONS. Mr. Neal and members of the subcommittee, thank you for this opportunity to testify with respect to the constitutional infirmities of H.R. 2443.

I am here today because in 45 years of legal experience as a lawyer, a judge, and a teacher, I have never come across a proposed statute that raises as many constitutional problems as this bill does, problems that leave it plainly and incurably unconstitutional. My written testimony discusses those constitutional infirmities in depth, and I will only touch on them here briefly.

First, the bill's retroactive application is plainly unconstitutional by attempting to reverse a conclusive determination by the Supreme Court against 47 States in *Delaware* v. *New York*. Congress would be exercising appellate jurisdiction over a Supreme Court decision that is otherwise unreviewable in violation of constitutionally mandated principles of separation of powers.

Mr. Easley says, well, the decision isn't final. But he uses the definition of finality found in rule 54(b) of the Federal Rules of Civil Procedure which deal with when judgments are final for purposes of appellate review. There is no appellate review over an original decision of the Supreme Court, and it is final for all purposes as far as the 47 losing States are concerned. And, thus, there is no question that an effort by Congress at this point to change that outcome would be an impermissible exercise of appellate jurisdiction over the Article 3 Supreme Court in violation of constitutionally mandated principles of separation of powers.

In every recent instance in which Congress has attempted such aggrandizement of its own powers, the Supreme Court has held the congressional action to be unconstitutional. The proposed retroactivity provision is a similarly inappropriate effort by Congress to exercise a power which has been textually committed by our Constitution to another branch.

My written statement sets forth the case law at greater length.

The prospective operation of H.R. 2443 presents a somewhat different set of issues. Congress may change the prospective operation of a nonconstitutional rule of law announced in a decision by an article 3 Court without violating principles of separation of powers. However, such a statute must still satisfy other constitutional limitations, and this one does not for three separate reasons.

First, H.R. 2443 would purport to authorize the States to violate the due process clause by asserting sovereignty over property with which the States have insufficient contacts. That property is the debt owed by the financial intermediary. It is simply a debtor-creditor relationship between that financial institution and its customer.

The due process clause of the 14th amendment places strict limits upon attempts by the States to exercise sovereignty with respect to persons, property or issues in which they have no legitimate interest. For example, New York cannot escheat real estate located in New Jersey. Congress may not authorize a lower standard of due process protection than the Court has held to be required.

We do not suppose, for example, that Congress could, consistent with due process, authorize Delaware to impose real estate taxes on property in Philadelphia or authorize New York to tax the income of residents of New Jersey or Connecticut who do not work in New York or otherwise have New York income. Yet, H.R. 2443 would purport to allow States to exercise similar sovereign power over property, the unclaimed funds, the debt owed by the financial institution to its customer for which those States have no better claim of dominion.

As the Supreme Court reasoned in *Delaware* v. *New York*, in explaining why it rejected the very rule now proposed in H.R. 2443, only a State with a clear connection to the creditor or debtor may escheat. This is why the reference in the Court's opinion in *Delaware* v. *New York* to Congress' power to alter the escheat rules and to the Disposition of Unclaimed Money Orders Act in which Congress modified the rule announced in an earlier escheat case, is simply irrelevant.

Congress, of course, has the power to alter those rules but only within constitutional bounds. In the instance of the money order statute, it did so after making a credible finding that the residence of most purchasers of money orders was the State in which the money order was purchased. So all the act did was confirm the primary rule.

H.R. 2443, in contrast, attempts to give the escheat power to a State with no nexus, in contravention of the due process clause. Nothing in the Court's opinion remotely suggests an intention to sanction such an action.

Second, H.R. 2443, would interfere with a State's core sovereign power, its power to escheat. It would be as if Congress passed a statute saying that a State may not impose real or person property tax on property located within its territory. H.R. 2443 is saying that the State of the location of the debtor cannot escheat.

Finally, and a very troubling aspect of the effort by those 47 States that are promoting H.R. 2443, is the fact that, as I understand it, a number of them have made undisclosed side agreements. The side deals reportedly involve a sharing of the escheat revenues by the more prosperous States with the less prosperous ones, not in accordance with the terms of the legislation being promoted but so as to give the smaller States an incentive to support the legislation in Congress.

Now, in declining to review recent attacks on legislation on federalism grounds, the Supreme Court has relied on the access of the States to a level playing field in Congress. That was particularly noticeable in the *Garcia* case. The Court has indicated that it would be willing to consider a claim that a State was singled out by Congress in a way that left it politically isolated or powerless.

This is what the reported side deal would appear to do. It would represent a severe breakdown in the process of political checks and balances that was so important to the Court majority in the *Garcia* case and which I discuss in further detail in my written statement.

A side deal designed to ensure support of States that would not otherwise have an interest in the passage of the legislation would also violate the interstate compact clause, and Congress should not act as an accessory to such unconstitutional conduct on the part of the States.

One additional aspect of H.R. 2443 that is not addressed in my written statement is its ultimate effect on the Federal Treasury should it, despite the constitutional defects that I have noted, be enforced. The bill, if enforced, would take property from the States of New York and Delaware and transfer that property to other States. Such a result would be a taking within the meaning of the fifth amendment for which those States would have a remedy in the U.S. Court of Claims.

Congress found itself in a similar position when it enacted the Regional Rail Reorganization Act requiring that secured creditors continue to fund the operation of the northeast railroads at a loss. The act was upheld only because there was a Tucker Act remedy for the resulting taking, and in the end the U.S. Treasury, not the secured creditors, was required to pay for the operation of the railroads while a reorganization plan was developed.

Congress may be sure that if H.R. 2443 were to be enforced New York, Delaware, and Massachusetts will be plaintiffs in the Court of Claims. Now, if Congress wants to subsidize the other 47 States, it should simply do so directly and avoid the transaction costs.

I have heard this morning a lot of testimony about the unfairness to the originators, and, with your leave, I would like to address that briefly.

First of all, there is nothing at all unfair about the system of using street name depository institutions to facilitate market transactions. It is clear that the market could not function at its present level without the use of book entry rather than paper trail transactions. Whether the issuer is a municipality or a corporation, the issuer derives the major benefit from the street name practice.

And there is nothing unfair at all about New York creating, by law, a debtor-creditor relationship which facilitates the functioning of that market and, thus, the access of these issuers to the capital market.

Second, the idea that the principal office of the issuer is the fairest place is both equitable and economic nonsense.

Take the example of Exxon Corp., which 4 or 5 years ago moved its headquarters from New York City to Houston. Exxon gets its oil from Kuwait or from the north slope of Alaska. It sells that oil in most of the States. It can pay dividends out of earnings and profits. Those earnings and profits all depend on sales. The sales are made at the pump at gas stations. It would make as much sense to argue that the only fair scheme is to let the States where the sales were made as the originators of the earnings and profits, escheat the unpaid dividends.

In sum, Mr. Chairman, members of the subcommittee, Members of Congress have an affirmative duty to refrain from voting for legislation they know to be unconstitutional. H.R. 2443 plainly is such legislation.

Thank you.

[The prepared statement of Mr. Gibbons can be found in the appendix.]

Chairman NEAL. Thank you.

If I may, let me take your latest example of Exxon. It does not strike me that that is a very appropriate example of what we are talking about here. It seems to me that a company like that would be quite an exception to the usual, not the norm.

In fact, I think in searching for some idea of fairness, the idea of going to the location where wealth was originated—I don't think anyone claims it is a perfect answer. The idea is, though, that at least it sort of tosses out the benefits randomly among the States. Most businesses are small businesses and so on. How would you react to that?

Mr. GIBBONS. Most small businesses don't resort to the capital markets in New York City and do not have the problem. We are talking of businesses that are involved in the New York capital market.

Chairman NEAL. Well, all the companies that—I mean, if you look at the thousands of issues that are on the major exchanges, the overwhelming majority of them are small, relative to Exxon. If you look at a sample of 30 stocks—the majority are not. They are randomly almost spread out among States.

I am saying—I am not saying this is the final answer. It strikes me there is a logic to it, though, it seems to me. Would you not agree with that?

Mr. GIBBONS. I do not, Mr. Chairman.

First of all, the States that probably benefit the most are New Jersey and Connecticut, the two big corporate headquarters States that also happen to have each the—Connecticut the first and New Jersey the second highest per capita income in the country. It seems to me to be almost obscene for those two States to be making their graft on the treasury of the State of New York.

Looking at the headquarters in question, the suggestion Connecticut and New Jersey are responsible for creating the earnings and profits from which, and it is the only source from which dividends could be paid, it seems to me economic nonsense.

You do not make profits unless you make sales. Sales are made everywhere. You do not make profits unless you have product to sell; and all of these corporations—not all of them perhaps, but the vast majority of them, get their products from all sorts of places.

Chairman NEAL. That is the idea. I think you are making the argument on the other side, aren't you? That honestly is the argument that the States, 47 States are making. It is not 2 States, it is 47 that are making the argument. We do not know ultimately what is fair but we will spread it out among the States.

Mr. GIBBONS. No. Because the legislation concentrates the escheat in the headquarter State. That State is not even primarily responsible for creation of the source of funds.

But for constitutional purposes, in any event, that is irrelevant. What is escheated is not the earnings and profits of those corporations and not the tax revenue paying the bondholders; it is the debt of the financial intermediary. That debt is a debt created by the State in which the financial intermediary is located or its capacity to contract is created by the State which incorporated it and gave it life.

The idea that some other State, because it discharged its debt by paying to a financial institution which was the holder of its stock, has a sufficient due process connection with that debt simply is not going to stand up in litigation.

Chairman NEAL. This is not only stocks. It is interest income from municipal bonds which are issued all over the country, or money is raised all over the country.

Mr. GIBBONS. It is interest on municipal bonds and municipalities resort to capital markets. Resort to capital markets is facilitated by the book entries system of trading which, in turn, depends upon the existence of the street-named holders. When those holders are paid, when the municipalities pay, their debt is discharged.

Chairman NEAL. Sure.

Mr. GIBBONS. The debt that is left is the substitute debt that the intermediary owes its customer. That is what is being escheated. That is what will be tested under the 14th amendment.

Chairman NEAL. There was another question both you and Mr. Easley spoke to. I must say I am a little bit unclear on it. You suggested the *Pennsylvania* decision had no relevance here. Mr. Easley, you suggested it was right on point. Could you pursue that a little bit further?

Mr. EASLEY. Let me say for you, Mr. Chairman, the *Pennsylvania* decision is the one the Court cited in this case. It stated Congress could do what it did in *Pennsylvania* v. *New York*. And actually, the language, I can quote for you: "If the States are dissatisfied with the outcome of a particular case, they may air their grievances before Congress. That body may reallocate property among the States without regard to the courts' interstate escheat rules." Congress overrode in *Pennsylvania* by passing a specific statute concerning abandoned money orders and travelers checks.

Then it goes on to say: "And it may ultimately settle this dispute through similar legislation." This dispute was the dispute before the Court regarding the $1 million. I think they clearly invite you to settle that $1 million dispute here the same way as was done in the *Pennsylvania* case in 1974 except that in this case, there is no final judgment yet.

In that case, in the *Pennsylvania* case, by the time this body acted, there was a final judgment that was in place for probably a year; final judgment for 1973; the bill passed in 1974. Until final judgment, you can pass constitutionally a retroactive statement. I disagree with Mr. Gibbons on that. He is just wrong on that issue. Either there is or is not final judgment. There is not final judgment in this case. It is still before the Special Master.

Chairman NEAL. Do you have a comment on that? Isn't that correct that this matter has not been finally resolved?

Mr. GIBBONS. No, Mr. Neal. It has been finally resolved against 47 States, and they had no place else to go. There is no appellate review over the Supreme Court's exercise of original jurisdiction. As I said earlier, oddly using the definition of final judgment from rule 54(b), if there is anything left open—and all that is left open here is how much New York owes to Delaware and a couple of minor States—for purposes of appellate review, under section 1292, it is not a final judgment. But section 1292 has nothing to do with the Supreme Court's original jurisdiction, because there is no appellate review. That is my point.

What is going on here is that Congress, if it passes this statute, will be exercising appellate review over a decision of the Supreme Court that is not otherwise reviewable.

Mr. KOPPELL. If I might suggest, Chairman Neal, there is a reference, of course, in the Supreme Court decision to what the Congress did in the *Western Union* case with the money orders; but first of all, the Congress did not act retroactively. They did not take escheat monies away from any State that got that escheat money.

Congress acted prospectively. It said any money that has not been escheated has to escheat under new rules. The precedent for Congress acting is only looking prospectively, not retroactively.

What the Court did is the Court said New York took all the money. Was that correct? The Court said, No, Delaware is entitled to some of the money; but the other States largely are not entitled to any.

That was a determination of what the law was. The Supreme Court decided that was the law. That is why when Judge Gibbons said there has, in effect, been a final determination, there has. It is not up to Congress. Congress has never had the power to change the law retroactively to change the rights of the parties as adjudicated by the Supreme Court. The Supreme Court said, This is the law; this has been the law for the last 30 years. The Congress can now say this should be the law, going forward, but cannot go back and say this, in fact, was the law even though the Supreme Court said it was not.

The Congress is not, as Judge Gibbons put it, an appellate court over the Supreme Court. So it would be entirely inappropriate, in addition to being unfair, inappropriate and unconstitutional, for the Congress to go back and change the law retroactively, thereby taking away escheat monies taken by the State of New York and indeed spent by the State of New York. That was not done in the *Western Union* case (the *Pennsylvania* v. *New York* case).

So I strongly disagree with any characterization of this bill being equivalent in any way to what the Congress did in the *Western Union* case.

Mr. GIBBONS. Mr. Neal, may I respond to your question about the reference to the bill?

Chairman NEAL. Yes, sir.

Mr. GIBBONS. In 12 U.S.C. section 2501(2), Congress made the credible finding, "A substantial majority of such purchasers reside in the States where such instruments are purchased."

On the basis of that credible finding, it created a presumption that the creditor resided in the State of purchase; and it simply applied the primary rule announced by the Supreme Court.

There was nothing inconsistent with what Congress did and what the Supreme Court did. And it left settled the escheats that had already taken place. It did not even disturb the effect of the prior judgment.

Chairman NEAL. I had just one brief question, if I may, then I will yield to the gentleman from New York.

You pointed out that the Court did not accept the recommendation of the Special Master. Was that on constitutional grounds or some other ground?

I thought you implied it was on constitutional grounds; that was not my understanding.

Mr. GIBBONS. The Court did not have to be terribly explicit in this instance, because it refused to change the existing rules; but the language that the Court uses clearly suggests that those rules are required as a matter of due process. And if you look at the cases beginning with the *Connecticut Mutual* case forward, you will see the whole problem of authority to escheat intangibles has been fought out on the issue of what States have sufficient nexus under the 14th amendment to make such an escheat.

Chairman NEAL. Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman.

First, I want to welcome my colleague with whom I served 6 years in the legislature. Mr. Koppell, you are an outstanding attorney general.

I want to thank you, Judge Gibbons, for your testimony.

Mr. Easley, do you dispute at all the 1974 law was prospective and not retroactive?

Mr. EASLEY. I certainly do. Maybe I don't. It was definitely retroactive. So there is no dispute. You don't have to take my word for it, you can get a copy and read it. It was retroactive.

Mr. SCHUMER. Judge Gibbons, would you—how was—I mean, it is my understanding it was completely prospectively done?

Mr. KOPPELL. It was retroactive only with respect to funds that had not yet been taken by New York.

Mr. SCHUMER. I see.

Mr. KOPPELL. That is not really retroactive.

Mr. SCHUMER. Do you agree with that, Mr. Easley? With any funds taken by the State, New York, any other, were any of those under the 1974 act? Did it force any State to disgorge any of the funds taken by it?

Mr. EASLEY. It did not touch funds that had already been the subject of a final judgment. In this case, you have no final judgment. Consequently——

Mr. SCHUMER. Without funds taken by the State?

Mr. EASLEY. Funds——

Mr. SCHUMER. And put in their treasury. Can you point to any instance as a result of the 1974 legislation where a State had to give up funds it had already taken?

Mr. EASLEY. If it was subject of that case that went to final judgment, they would not.

Mr. SCHUMER. Can you point——

Mr. EASLEY. Please, let me finish my answer.

Mr. SCHUMER. I would like you to hear the answer.

Mr. EASLEY. I know the answer to the one you asked. The answer to the question is that anything that a State escheated that was not subject to that litigation, they would have had to give up back to 1965 or anything that at the time had not yet run on. I don't know what New York was.

Mr. SCHUMER. Was there any specific funds that a State took and put in its treasury that had to be disgorged; yes or no?

Mr. EASLEY. I would have no way of knowing that.

Mr. GIBBONS. The answer is no.

Mr. SCHUMER. Judge Gibbons says no. Thank you.

Second, Mr. Easley, there has been, and Judge Gibbons mentioned, rumors flying about that there is an agreement among the State plaintiffs to redistribute the funds; that the States that got larger amounts said to the smaller States in order to gain their legislative support, that we will give you some of those funds. Are you aware of such an agreement?

Mr. EASLEY. I am aware of nothing of the sort.

Mr. SCHUMER. Your State did not partake in such agreement?

Mr. EASLEY. Let me finish. My State is not involved in that. So far as I know, no other States are. We are not discussing anything of that nature. I was surprised to hear it come up today.

Mr. SCHUMER. If North Carolina were to be involved in that, you would have to know, I assume, because you are the spearhead of this in North Carolina?

Mr. EASLEY. That is correct.

Mr. SCHUMER. Do you agree with Judge Gibbons that such a sharing might well be unconsitutional?

Mr. EASLEY. I don't know. The agreements between the States, so long as it does not affect another State, would not violate the clause.

Now, agreements between States that affected a third State would.

Mr. SCHUMER. By definition this does, doesn't it?

Mr. EASLEY. Not necessarily. If I were to make an agreement—I am North Carolina—with New York, clearly that is not a problem; if I start making agreements with New York that affected Vermont, then we have trouble.

Mr. SCHUMER. Let me ask a third question. Does your State have a contingency fee agreement with the attorney, Mr. Nash?

Mr. EASLEY. Yes.

Mr. SCHUMER. Would you tell us what that contingency agreement calls for?

Mr. EASLEY. I couldn't tell you the details of it at this point.

Mr. SCHUMER. Let me read you what I heard. You tell me if the—if it squares with what you have. They get approximately—that they get approximately—well, you know what I would ask you to do. Without objection, please submit for the record the contingency fee agreement. It could clearly mount up into the millions of dollars; is that correct? With all 31 States?

Mr. EASLEY. With all of the States, I don't know what it would come to. We still are before the master trying to determine the total amount of money. Let me say that—I don't understand why that should be an issue. It is not part of the legislation. It certainly is——

Mr. SCHUMER. I am going to try to make it part of the legislation.

Mr. EASLEY. I know you will try. But it is not yet. The reason I think it should not be an issue is these States would not be able to proceed probably if they didn't proceed on a contingency basis. I want Chairman Neal to understand this.

This firm has probably worked up somewhere in the neighborhood—we were paying billable hours somewhere in the neighborhood of $3 million in fees. If I agree to pay them on billable hours, those kinds of fees, you wouldn't be the only one not running for public office again in North Carolina.

So this is the way you will see in most cases—I practiced law in the private sector as well as prosecuted—the contingency fee certainly works well. It is not for legislation. It is for litigation. Legislation, and then more litigation. You said you will take it up if it passes this morning as you sat here.

Mr. SCHUMER. Here is what I heard the agreement entails. You tell me if this squares with what you know. We will leave the record open.

That 7.5 percent for each State of the first $4 million of each State's recovery. Five percent of the next $2 million and 2.5 percent of amounts over $6 million.

Does that sound about right?

Mr. EASLEY. There is a 7.5 figure in there that I am aware of. I am not trying to be evasive. I know there is a cutoff at a certain point. That may very well be close.

Mr. SCHUMER. Let me ask you this: Your State, North Carolina, has a prohibition against contingency fee arrangements that are dependent on legislation; is that correct?

Mr. EASLEY. I think probably we do. You know, I am not certain.

Mr. SCHUMER. Why is this public policy OK for North Carolina but not OK for the U.S. Congress?

Mr. EASLEY. Mr. Schumer, I think you need to understand this case is a case, a point I have been trying to make all morning. It is still a case. We began with litigation and that is certainly appropriate to go on a contingency fee in litigation. That is where, as I understand it, the attorney general before me, that is the way the deal was made.

Now, once the Court ruled as it did, it invited legislation.

Mr. SCHUMER. I would dispute that characterization. I am reading it. It says "may legislate."

Mr. EASLEY. We can go down here if you are not satisfied. If you are not satisfied, you can go to the Congress. We went to the Congress. We read the subpoena. We assumed there would be legislation. Knowing if we are successful that will be attacked. We still do not have money. There will be more litigation. It just happens there will be legislation and lobbying between two Court proceedings, at least two Court proceedings. So it is not a contingency fee for lobbying.

Mr. SCHUMER. Would it not be true right now, Mr. Easley, if no legislation passed, there would be no reward to your State or a very, very small reward; and that the contingency fee agreement depends on the Congress passing and the President signing legislation? It seems to me that that is incontrovertible.

Mr. EASLEY. And the Supreme Court upholding it.

Mr. SCHUMER. You did not sign a contingency fee that was just limited to the Court. The contingency fee agreement—one of the objections I have to this is it seems to me that there is a lot of misinformation out there.

Why is there misinformation out there? Well, this happens every day in Washington. It is not unusual. But one of the reasons would be that there would be an incentive if someone was going to make money if the legislation passed and not make money if the legislation didn't pass. This sort of—well, let's put it charitably—tells just one side of the story. That strikes me as just patently logical.

What I object to, what your State objects to, there is something, don't you agree, highly unsavory about somebody—and I will bet—I don't think Mr. Nash is the only one. My guess is there are lots of contingency fee agreements between lobbyists and different groups who seek legislation in Congress; and I think if this legislation were to die tomorrow, for whatever reason, I think we ought to pass such legislation.

You still haven't really answered my question. Why is it right for North Carolina to abolish this kind of arrangement; that is, the kind of thing our constituents—let me finish—why is it OK for North Carolina to have a statute that bars this but for its government to sign an agreement that allows it to occur in Congress? That is my question.

Mr. EASLEY. OK. The premise of your question is wrong.

The agreement, the contingency agreement was for——

Mr. SCHUMER. Wasn't just for litigation.

Mr. EASLEY. Let me try to get through this, this time. It is for litigation.

Mr. SCHUMER. Just litigation?

Mr. EASLEY. Please, let me complete my answer. For litigation. That whereas the principal agreement—that is where we got started—that is where the law firm got involved. The litigation took us to the Supreme Court. The Supreme Court took us to the legislature. The legislature is going to take us back to the Supreme Court.

So it is a holistic approach to the problem if you——

Mr. SCHUMER. Try to answer——

Mr. EASLEY. Look at it this way.

Mr. SCHUMER. Right now, at this point in time, if there were no legislation—forget litigation, no legislation—would North Carolina have any recourse?

Conversely, is it only by legislation now given the Court's ruling that this contingency fee agreement will come into affect and the lawyers will make anywhere between $7 and $16 million, at least according to my figures. Don't argue to me we might have a corporate case or we did have a court case.

Your agreement with North Carolina to my understanding as the facts bore out, you didn't say just litigation, you said legislation, as well, however they got there, I would not characterize it by hook or crook, although it came to mind a little bit, but however they got it, would give them a fee. It is legislation now. I know what happened in the past. That is why they came here. That is the whole problem.

If it had just said, Well, represent us in court, we win, we will give you this; we lose, we will give you that, fine. But the whole reason that they have descended on the legislature, on the Congress, is because now the only way they are going to get their money is if Congress passes something. To me that is terribly unseemly.

Mr. EASLEY. It is difficult to answer a question like that with a yes or no.

Mr. SCHUMER. I agree. You may answer it—please don't just repeat. Don't repeat there was litigation, there may be litigation in the future. Please address the issue that your agreement with these attorneys also depends and now solely depends, but even at the outset would have in part depended upon legislation being passed, something your State prohibits.

Mr. EASLEY. I would not say at the outset it depended upon legislation at all.

Mr. SCHUMER. You thought you would win. Why does the agreement allow a payment if legislation passes given that your litigation failed?

Mr. EASLEY. The agreement involves a payment if we get paid; and it allows it for litigation legislation and the litigation that you said you were going to bring if the bill passes.

Mr. SCHUMER. Would you support that legislation? Would you support the legislation that I said I will attach to this, that outlaws—let's say, word for word the same as the North Carolina statute; that allows contingency fee payments for influencing, successfully influencing the outcome of legislation.

Mr. EASLEY. Just for specific lobbying, not litigation involved?

Mr. SCHUMER. Correct.

Mr. EASLEY. Which is not the case.

Mr. SCHUMER. Correct. Let's assume it is not the case although I dispute you on that.

Mr. EASLEY. Well, we are going to have to agree to disagree, I suppose.

Mr. SCHUMER. Let's say if it was just legislation. Would you support it?

Mr. EASLEY. I don't know. I have not thought about it.

Mr. SCHUMER. Can you tell me what your hesitation is?

Mr. EASLEY. Because it is not an issue. We are talking about New York and Delaware taking all of the money on escheats that they have not created or originated. That is what this bill is about. I hadn't thought much about contingency fees or amendments you might offer today.

Chairman NEAL. Will the gentleman yield?

Mr. SCHUMER. I will be happy to yield to the chairman.

Chairman NEAL. If I may ask this question on this point: Is the gentleman from New York opposed to contingency fees in all areas where legislation is involved?

Mr. SCHUMER. For influencing legislation, yes, I am.

Chairman NEAL. Think of this example: I know contingency fees are paid sometimes for resolving disability cases. And that I think back to a period in the early 1980's when there were terrible examples of people being thrown off the disability rolls when they really needed it and deserved the disability payments and so on. Many cases were brought by lawyers working on contingencies to help reinstate those benefits and ultimately that led to legislation, us becoming aware of this bad situation led to legislation attempting to—which made some corrections in disability law. Is that—would that—was that appropriate?

Mr. SCHUMER. If the agreement said if I get the bill through Congress, your disability or general bill on disability, I make a third or a fifth or a quarter or a half, yes, I would oppose it. If it said, if I might, in court I will represent you and if we win, you will get a certain share, that is a different issue.

The legislative process and the litigation process are quite different. I don't have a problem with it in the litigation process.

Now if it says, Mr. Easley said, however you pass it, by legislation or by court, we will pay you a certain amount, I would oppose that, I would like to outlaw that, limit it just to the litigation part.

Chairman NEAL. I guess the point is, I think it is a very interesting idea.

May I suggest we move on, though, away from this issue back to the bill?

Mr. SCHUMER. If I haven't made my point by now, I doubt I will.

Chairman NEAL. I think you have made it very well.

Mr. Castle.

Mr. CASTLE. Thank you, Mr. Chairman, for your patience. I will try to be relatively brief.

Judge Gibbons, you are an expert in the law. We all know—I don't think any of us question this—the law the Court handed down in *Delaware* v. *New York* has been the Court—the decisions of the Supreme Court for sometime back. You also stated, I believe, very firmly, that H.R. 2443 would be unconstitutional both retroactively and prospectively; is that correct?

Mr. GIBBONS. Yes.

Mr. CASTLE. You may differ as to reasons but it is unconstitutional both ways; is that correct?

Mr. GIBBONS. Yes.

Mr. CASTLE. You said members should refrain from voting for legislation which we know to be unconstitutional. I believe that is more than we should refrain. I think we have a legal duty, do we not?

Mr. GIBBONS. You took an oath.

Mr. CASTLE. That is what I thought.

Going to Attorney General Koppell, if I could, based on—and this is hypothetical—if this law passed as it is today, and you had to make a decision a year from now as to whether or not New York would litigate the questions of constitutionality, the various damage issues involved with it, and so forth, and you had the go-ahead from anybody whom you needed the go-ahead from, is it your view you would litigate this law?

Mr. KOPPELL. Absolutely. We would consult with the Governor. I absolutely would litigate.

It just seems beyond comprehension that anyone would think to change this law retroactively after the Supreme Court found specifically that a precedent dictated the result that they found and that precedent, you know, the Supreme Court considered this principal executive office, I think Chairman Neal made reference to it. The master suggested this solution.

The Supreme Court specifically found—and if you read the Supreme Court decision, it was related particularly to this particular proposal by the master which the Supreme Court found was contravening precedent. So the Supreme Court specifically found this was not the law.

Incidentally, they also found that it was not and should not be the law. I am not sure they found it constitutionally that was a good point you made, Chairman Neal. They did say, and I looked at it after you made that comment, what they said was precedent, efficiency, and equity all dictate the rejection of the executive office's proposal: Precedent, efficiency, and equity.

I would say on precedent, that indicates that you cannot do it constitutionally retroactively. Efficiency and equity address some other concerns that you have. Clearly, the Supreme Court doesn't believe that this is either efficient or equitable, nor do we. I can assure you that we will in fact challenge the constitutionality of this bill should it become a law.

Mr. SCHUMER. Whether it is prospective——

Mr. KOPPELL. Yes.

Mr. CASTLE. Prospectively, too?

Mr. SCHUMER. Will the gentleman yield?

I take it you are saying prospectively or retroactively?

Mr. KOPPELL. In its current form, absolutely.

Chairman NEAL. What would be the basis for your challenge on the prospective application?

Mr. KOPPELL. We do not believe prospectively that there is a sufficient nexus in order to distribute the funds in this way.

Chairman NEAL. That is a constitutional question?

Mr. KOPPELL. Yes.

Mr. SCHUMER. Mr. Chairman, this was brought up before by both Judge Gibbons and one of our previous witnesses. I cannot recall who. I don't want to give the impression that prospectively—I mentioned, I think, it is debatable whether it is constitutional or not prospectively.

I don't think it is very debatable retroactively. The reasoning is that to require one State to give up money to another State, there has to be some logical connection; and the place of the issuers' headquarters of the stock issuer may not be enough of a connection. I would say the cases are divided on it. I don't think it is a clear question one way or the other.

Mr. GIBBONS. Mr. Chairman, with respect——

Chairman NEAL. That is a question before the Congress, though, isn't it?

Mr. SCHUMER. The court, too.

Mr. KOPPELL. Mr. Chairman, I would say this: We are not asserting there would be no other system other than the one that the Court has found to be the law of this country for the past decades, that there is no other possibility. We would argue the possibility has to relate to the claim of the particular State to the monies that are being escheated and the claim of a State based on principle executive office is so remote as to make it an unconstitutional claim.

It is—as was pointed out by Judge Gibbons, a State cannot—New York State could not tax land in New Jersey. That would not be a constitutional exercise. This is not a tax, but it is a taking of monies. Unless there is a relationship between the State that is taking the money and the money, you cannot justify it.

I am not saying—again, just to clarify—I am not saying that you could not create another system. Maybe State of incorporation, for instance; at least there, there is a nexus that might work. I am not ratifying that. But what I am saying is that State of principle executive offices is so remote from a relationship with this money which is actually owed by the financial intermediary, not by the company, it is—the debtor is the financial intermediary. The relationship here is so remote as to not create a constitutional scheme even prospectively.

Mr. CASTLE. If I may reclaim my time? Excuse me.

Chairman NEAL. On that point, wasn't the Special Master chosen for his expertise in this area? Isn't he a constitutional scholar?

Mr. EASLEY. That is correct. He was also on the U.S.C. commercial law.

Chairman NEAL. This is his recommendation?

Mr. EASLEY. His recommendation.

Chairman NEAL. It seems to me frankly we would question——

Mr. EASLEY. This same argument was made, Mr. Chairman, to him, and on page 70, he says, in sum, minimum contact is a red herring in this case. That is what it is here today.

Chairman NEAL. What are the credentials of the Special Master?

Mr. EASLEY. Dean of the University of Virginia Law School; had high credentials in commercial law and impressed a good number of the members of the Supreme Court.

Mr. BOONE. Mr. Chairman, may I clarify?

The Special Master, Thomas Jackson, is a recognized commercial law expert. He is not a constitutional law expert. Moreover, his recommendations were rejected by the Supreme Court.

Mr. EASLEY. That is not correct. That just simply is not correct. We cannot let that stand. What the Supreme Court said is that only by adhering to precedent, they are adhering to precedent. Even the——

Mr. KOPPELL. What about equity? They talk about that, too?

Mr. EASLEY. Are you going to read the whole paragraph? I will.

They said we are bound by precedent, from 1965. That doesn't keep Congress from going back and doing exactly what the Master suggested. And the dissents in the case, which were three, Justices White, Blackmun, and Stevens, said, "In my view the Special Master did no violence to our precedents and has a much superior approach and more equitable result than does the Court." That is what three of the judges said. I recognize that is the dissent. But I want to point that out to you.

Nowhere in the case, if you read the case, Mr. Chairman, nowhere do you get any inkling by dicta or whatever that they would find this unconstitutional. They say that you may well decide to do what they did in the *Pennsylvania* case, which is basically what this bill does. They didn't say, But that would be unconstitutional. They said, It would be a good idea, in so many words.

Chairman NEAL. I am sorry I interrupted you, Mr. Castle.

Mr. KOPPELL. May I respond to one thing Mr. Easley just said. He said what is done in the *Pennsylvania* case is what this bill does. In the *Pennsylvania* case, they didn't award the money to the State where the principal executive office of Western Union was located. In the *Pennsylvania* case, they said where the money order was purchased, that that State ought to get the money. That is a far different result than here.

So I cannot—to say that what the Congress did in the *Pennsylvania* case is the same as what the Congress seeks to do here, I mean, that just simply is incorrect.

Mr. EASLEY. They were awarding back to the originator State the escheat rights, back to the creator of the revenue, the property, the income, the intangible property. That is what——

Mr. BOONE. Mr. Chairman, may I interpose—since I litigated this case on behalf of New York? Let me try to clarify what happened in *Western Union*. What Congress did was to effectuate the primary rule as reaffirmed by the Supreme Court by supplying the presumption that the Court was not willing to supply, that since the purchaser of the money order is likely to reside in the State where that money order was purchased, the creditor is that person who purchased the money order in the State where Western Union operated and, that State would escheat the funds. Congress didn't really change the rules. It just supplied a presumption to effectuate the Court's rule.

Chairman NEAL. Is it not an equally reasonable presumption to think that the monies should be escheated to State whereas that money was—that wealth was created in the first place? Is that——

Mr. EASLEY. That is exactly what was done in Pennsylvania.

Mr. GIBBONS. In the one instance, you are laying down a change in a well settled, substantive due process limitation on State power, State sovereignty. In the other instance, Congress merely laid down a procedural rule for determining the location of the residence of the purchaser of the money order. The two problems are not even distantly related.

Mr. KOPPELL. Chairman Neal, if I may, the primary rule deals with the State of the creditor. That would not be the company. That would be the owner of the stock, the owner of the bond. So what the Court was saying was that person who bought the money order from Western Union, it is that person's State and the Court refused to make a presumption that where the money order was bought—because we do not know where that person went, that person disappeared. The Congress provided the presumption that that person in fact was a resident or could be presumed to be a resident of the State where the money order was bought.

So they were dealing with the primary rule which is getting the money to the creditor. We are not dealing with the primary rule at all here. We are dealing with the secondary rule. That is what do you do when you have no idea where the creditor is and you only know where the debtor is? We are only talking about the secondary rule here. That is why the *Pennsylvania* case is not analogous at all.

Chairman NEAL. Well, the broad principles seem somewhat analogous. I am not saying this is totally alike. But it is not hard to find out, as Governor Richards pointed out, where a company that is on the SEC files is incorporated.

Mr. KOPPELL. It is not the company. What the *Pennsylvania* case is analogous to is finding out where the owner of the stock lived; and we do not know that. What happens here is Merrill Lynch is holding the money. If we knew that—if we knew the owner—if we knew the person who was supposed to get the dividend and that person lived in, say, California, if we knew that the owner of the stock lived in California and we just cannot find that person, but we knew that the last address was California, California gets that. That is true now; that has been true; that is true before and after this case. We do not need to do any legislation or anything. California gets that.

The problem we are dealing with is only where we do not know whether the person was a resident of California last, Florida, Europe, wherever. Under the primary rule the distribution goes to the State of the creditor, the person who should be getting the dividend. In the *Western Union* case, the *Pennsylvania* v. *New York* case, the Court said since they did not know the State of the creditor, the money should go to New York where the intermediary was incorporated; but then what the Congress said was, No, no, no; we are going to assume even though we do not know whether the creditor (the person who bought the money order) lived in California or not, since it was purchased in California, we are going to effectuate the primary rule by presuming the purchaser resided in California. It will not go to the financial intermediary in New York, it will go to California because the person who purchased the money order was in California. There is no analogy. Here we do not know where the stock was purchased.

I suppose maybe that could be the analogous rule, that we make the rule, give it to the State where the stock was purchased. That was probably, you know, probably the same State.

Mr. BOONE. Mr. Chairman, may I——

Chairman NEAL. Probably, wasn't New York or Delaware. Probably one of the other States.

Mr. KOPPELL. If Congress wanted to make that——

Chairman NEAL. The majority of the population lives in other States.

Mr. KOPPELL. If Congress wanted to make that rule, we would have to evaluate it. I am not saying that would be right or wrong.

That would be more analogous to what happened in *Pennsylvania*. If Congress said we are not going to give it to New York, and not give it to the State where the business has its principal executive office, if we are going to give it to the State where the stock was purchased, if that is what you did, would be more analogous to what they did in that case.

Chairman NEAL. The net effect wouldn't be much different?

Mr. GIBBONS. Oh, I think, Mr. Neal, it would be very, very different.

Mr. BOONE. May I interpose here, please?

Let me try to clarify.

What this bill does is change who the debtor is; you talked about the originator of the debt. OK. On commercial law principles, that originator—the issuer of the debt—has an obligation to pay the distribution to the record holder. It pays that distribution. Once it pays the distribution, it has discharged its debt as a matter of law.

The financial intermediary, which is between the issuer and the ultimate beneficial owner, the way—and you will hear this later—the way the financial intermediaries operate, they routinely pay their customer. The customer is not lost vis-a-vis the financial intermediary in that customer. The problem comes with trades among the financial intermediaries.

There are multiple transactions that go on, and the first financial intermediary may be paid, and in fact owes the money to another financial intermediary. Ninety-nine percent of claims for this kind of property received by the New York comptroller are financial institutions, which I think is a strong indication that these are monies lost among financial intermediaries.

They are the debtors. That is what the Supreme Court said. That is who the beneficial owner would look to if the beneficial owner has not been paid. The beneficial owner does not look to the issuer or the originator of the debt, it is the financial intermediary that is on the hook. Because those financial intermediaries are incorporated in New York, Delaware, and Massachusetts. It is on that basis that our State escheats most of those monies.

Chairman NEAL. I think we are going too long with this panel. One other question, if I may. Are these claims among the financial institutions on behalf of the financial institutions solely or on behalf of others who are making claims?

Mr. GIBBONS. Solely.

Mr. BOONE. Typically, what has happened is that the financial institutions pay the customer. Then the claim is traced down the chain against all the financial intermediaries involved until the financial intermediary that has the excess or an overage that it is not entitled to is located. They do not voluntarily give it up.

Mr. CASTLE. May I just put forth a couple more questions. I know this is going on a long time. I think this is so vitally important, we really need to do this.

Let me follow up that same line of discussion. I think it really is at the heart of this whole thing. I want the chairman to understand this and I want to understand, too, particularly those who will make decisions on what happens to this legislation. That is exactly what we are dealing with here.

We know we have the big universal escheats. We know we are down to those that are unknown. Basically, as Mr. Boone said and others said here today, repeatedly, but it is important we understand it, we are down to the financial institutions making transactions among themselves as stocks change hands and payment doesn't catch up, whatever it may be. But the ultimate beneficiaries, the customers, are paid automatically by these financial institutions. So they receive their money.

The original issuer of this stock has in each and every case discharged its responsibility by law. Because the financial institution discharges their responsibility, what we are really dealing with here are these accounts between financial institutions. In other words, the issuer, the beneficiary are just not a part of this. They are really not part of what we are dealing with. Therefore, the legislation shouldn't even apply.

Mr. KOPPELL. Let me explain. It is getting—some of the characterizations are getting a little bit confusing. Remember, these are abandoned properties. They are unclaimed properties. So, for instance, you take an IBM dividend payment, these are IBM dividend payments that remain in the accounts of Merrill Lynch; and they do not know to whom those payments should be made. They do not have a name of somebody. They do not have Mr. Charles Smith who lived, you know, in New Jersey. If that were true and they just had to pay Charles Smith because it came back in the mail or for whatever other reason, it would go to New Jersey.

These are IBM dividend payments they have in their account and they cannot determine to whom they are owed. They probably are owed to other financial institutions, because what happens here is the New York State comptroller escheats Merrill Lynch dividends after 3 years, whatever the period is, the comptroller has those monies. The comptroller tells us that—you know, those monies—Governor Richards was right, that money has to be turned back to the rightful owner if the rightful owner shows up. Governor Richards was right about that.

Our comptroller's office tells us that 99 percent of the claims for that abandoned money comes not from Mr. Jones who used to live in New Jersey and now suddenly decides—or remembers that he didn't get his dividends because he moved and never gave a forwarding address, so he goes to the company and the company says, Well, I don't have it any more, it is with the comptroller, you have to go to the comptroller, that is not where the claims come from. They come from other financial institutions that say because of bookkeeping errors, we forgot to ask Merrill Lynch for those dividends. So they stayed in Merrill Lynch's account.

I am sorry, it is 97 percent of the claims, 99 percent of the dollars that come to the comptrollers's office are from other financial intermediaries.

Chairman NEAL. On behalf of other financial intermediaries? Financial institutions?

Mr. BOONE. The claims are from the financial intermediaries.

Mr. EASLEY. On behalf—in this instance, IBM is the one who generated the money. They are the ones who made it. Why in the world go to Merrill Lynch or to Delaware or New York just because Merrill Lynch happened to have Secretary of State-stamped articles of incorporation there. They had not put blood and sweat into making this money. It ought to go back to the State where the money was generated from and where it originated.

Chairman NEAL. There is no question in your mind, Mr. Easley, about this, the characterization of the money? The money in question here is the result of claims between financial institutions?

Mr. EASLEY. Where I get a little concerned is that the analogies that are being used—and I think Mr. Koppell would agree with me—tend to mix claimed and unclaimed or known and unknown properties. That I think is confusing the subcommittee. Because that travels back and forth between financial institutions, obviously, it is a known property or it would not be traveling.

So it is the unknown we are dealing with and concerned about. That is why the characterization of this money traveling back and forth between financial institutions is really not appropriate for this matter for consideration.

Mr. KOPPELL. Yes. This is money that is unclaimed money where the beneficiary is unknown. The question is which State should get it. Merely because they can't pay it to anyone doesn't mean that Merrill Lynch is entitled to keep it. Merrill Lynch has to give it to the State under our abandoned property law.

So then the question comes to which State should Merrill Lynch give. Now, the point that is trying to be made here is that mostly the money becomes abandoned because of mistakes in bookkeeping between financial intermediaries, not because the ultimate beneficiary hasn't paid. Let's assume the transactions are between Merrill Lynch and Bear Stearns. Bear Stearns perhaps paid the dividend to its customer and was supposed to ask Merrill Lynch for the money, but failed to. Now, eventually, Bear Stearns may realize through, you know, auditing that in fact this money is theirs and Bear Stearns will go to the comptroller and say, Mr. Comptroller, that money is ours.

But in most instances, the ultimate beneficiary is paid. Certainly, in every instance the issuer, the person who owes the money is out of the transaction. It is a question, why did they get abandoned? It got abandoned because of mistakes made by these financial intermediaries or because people dropped out of the records entirely. So it is abandoned property held by these financial intermediaries, and under the law of the State of New York, the financial intermediaries are not entitled to keep it, New York takes it.

Mr. GIBBONS. Mr. Neal, perhaps there is a vocabulary problem here. There has been a lot of discussion about escheating dividends. The one thing that is clear is that dividends are not being escheated. What is being escheated is a debt, a money obligation owed by the financial institution to somebody. It might be directly to that financial institution's retail customer or it might be to an intermediary like a broker; but there is no question what is being escheated. The only property that is being escheated is the debt owed by the financial institution.

The debt represented by the declared dividend is long since dead. The issuer doesn't owe any debt anymore. How you can say that the debt from this financial institution could be escheated by the headquarters of the—the State of the headquarters of a corporation that does not any longer owe anything seems to me to defy logic.

Mr. EASLEY. What is being escheated is property, property that came from somewhere. What we are suggesting is that it go back to where it came from. The State escheated where it came from, where it originated.

Mr. CASTLE. Where it came from is the State of incorporation.

Mr. EASLEY. Not necessarily so.

Mr. CASTLE. I don't see how you can argue that the headquarters is the nexus in all of this. In this day and age, of all the multinational corporations, look at RJR Nabisco. It moved from Winston-Salem to Atlanta because Ross Johnson wanted to live in Atlanta. They are coming down to Washington right and left. The real earnings are back in the home States. The real owners, 50 State owners all over the country.

I don't see this headquarters—I don't agree with the Master. I don't see the headquarters as being the right definition of the nexus of a corporation in this day and age. I have a real problem with that. I happen to think the Supreme Court didn't see that either.

I will certify to this gentleman that I am sure he is a commercial law expert, but the Supreme Court knows something about constitutional law and rebuffed his decision. I don't know why we in Congress should pick that up.

Mr. EASLEY. It isn't a perfect answer. You are right. Placing a corporation is clearly a bad answer.

Mr. CASTLE. If it is just financial institutions, if it is just the financial institutions, as Judge Gibbons said, others said, it is just the debt between the financial institutions, then it comes down to who is holding the security, what else can you look at which is the place of incorporation of these financial institutions. That is a legal mechanism that was put together, as you know—you are well versed in the law.

It is like a person, recognizable, States have done that. That is perfectly fine. That is what these three States have done over the years. They have built up a body of law in this area. They deserve to be protected, for God's sake, in those circumstances.

Mr. EASLEY. Debt is a legal term that is used by the Supreme Court in its legalese posture. It doesn't have anything to do with the origination or creative—or where the—where the problem was created.

The second point you make about being unfair to New York, I want to say again, one more time, they were put on notice in 1988. That is where most of this money has come from since 1988. That is when they really started raking in the big bucks. They were also put on notice before that with the *Pennsylvania* case. That was *Pennsylvania* v. *New York*. So they were put on notice in 1974.

They were also put on notice again in the early 1980's when Payne Webber successfully refused to pay them or give them the escheat property and beat them at their own statute.

Mr. CASTLE. Other States including States like Delaware, for example——

Mr. EASLEY. Put on notice——

Mr. CASTLE. Other States have been collecting this money. In collecting this money, maybe not all the money we should have collected in Delaware's case, but in collecting the money, have been expending it during that time. Now we are trying to reach back over 20 years and re-sort all of that, argue the retroactivity.

Mr. KOPPELL. Wait a minute. Wait a minute. Hold on. We were put on notice there was a legal claim against us. We had to defend against it. The fact of the matter is we won part and lost part. We lost the part to Delaware. We are paying that. We have settled that.

But we won the part with respect to the other States. You are right. We were put on notice and we kept it in mind and we won. At least with respect to the 47 States. Now you are saying we were put on notice we should pay it back because we won. That is a little bit odd.

Mr. EASLEY. There is no hardship here. They kept taking it, didn't put any aside. Maybe they did put it aside. I don't know where it is. They certainly knew they were in trouble.

Mr. KOPPELL. There certainly is hardship. That I don't think we can debate.

Mr. CASTLE. I yield back.

Chairman NEAL. I want to thank this panel very much. You all have been a big help to us.

Mr. KOPPELL. Thank you, Mr. Chairman.

Mr. GIBBONS. Thank you, Mr. Chairman.

Mr. EASLEY. Thank you, Mr. Chairman.

Chairman NEAL. I would now like to go to our next panel who will probably help us on the same question a little bit in more detail.

This panel is comprised of the Honorable Bob Holden, treasurer, State of Missouri; Honorable Kathleen Brown, treasurer of the State of California; and the Honorable Joseph D. Malone, treasurer and receiver general of the State of Massachusetts.

Let me announce our third witness on this panel was the Honorable Joseph Malone. He was unable to make it. His assistant, Ms. Pasqua Scibelli, is here in his place.

We will put your statements in the record and ask you to summarize. We are running a little behind schedule. I wanted to thank you all for your patience, and for bearing with us. We will try to not keep you too much longer.

If there is no objection, we will hear from you in the order in which we introduced you.

Chairman NEAL. Mr. Holden.

STATEMENT OF HON. BOB HOLDEN, TREASURER, STATE OF MISSOURI

Mr. HOLDEN. Thank you, Mr. Chairman.

Members of the subcommittee, I know it has been a long day. Let me say before I get into some of my testimony, that as State treasurer of Missouri, I know of no deals with my State involved in this discussion. I know of no ongoing negotiations that have been talked about extensively throughout the course of the morning.

I am here today as treasurer of the State of Missouri to express my strong support for H.R. 2443 and to urge the subcommittee to report this legislation as expeditiously as possible.

I would also note that while I am here as an advocate of H.R. 2443, I appreciate the difficult task this subcommittee faces in trying to decipher the interests involving the 3 States as well as the other 47 States. Prior to my election as State treasurer, I served as administrative assistant to Congressman Gephardt. So I understand some of the difficulties that you have.

I also had the opportunity to serve three terms in the general assembly, so I understand how these issues and differing points of view can be difficult for committees to address. Notwithstanding, I think this is an issue this subcommittee, and I hope this Congress, will expeditiously move forward on.

I am also pleased to submit for the record letters recently signed by the Governors of 46 States and the treasurers of 40 States and resolutions adopted by both the National Association of State Treasurers and the National Association of Unclaimed Property Administrators. All endorse the legislation and urge its prompt enactment.

H.R. 2443 can be summarized in a single word: Fairness. The issue and policy choices are simple, although the technicalities may be complex. The issue for this subcommittee to decide is whether two or three rather than all the States should be permitted to escheat more than $100 million annually of interest and dividends paid by taxpayers of and companies headquartered in all 50 States.

Unless H.R. 2443 is expeditiously enacted into law, the more than $1 billion of securities distribution seized by New York since 1972 will be divided by only three States: New York, Delaware, and Massachusetts. The 47 remaining States collectively would receive less than $2 million. The $100 to $150 million such funds which accrue annually will also be divided almost entirely by these 3 States with the remaining 47 States collectively receiving between $200,000 and $300,000.

This is so because of the happenstance that most large brokerage firms are incorporated in Delaware; the largest security depository and most money centered banks are incorporated or chartered in New York; and one of the largest brokerage firms is incorporated in Massachusetts.

Let me give you an example in the most concrete terms to demonstrate the patent unfairness of this allocation. The State of Missouri issued approximately $1.5 billion in general obligation and other bonds over the past 5 years. Money to pay the interest on these bonds is raised by taxes on Missouri citizens. Over the past 5 years, Missouri taxpayers paid $545 million in total debt services on Missouri's outstanding bond obligations.

If an interest payment on one of these bonds does not reach the beneficial owner—the investor who owns the bond—but instead ends up in the hands of Merrill Lynch, which does not know to whom the money belongs, the interest payment goes to the State of Delaware to finance projects that benefit the citizens of Delaware, solely because Merrill Lynch is incorporated in Delaware.

If that same interest payment ends up in the hands of First Boston, it will go to the Commonwealth of Massachusetts to be used to finance projects that benefit the citizens of Massachusetts, solely because First Boston is incorporated in Massachusetts.

If that same interest payment ends up in the hands of the Depository Trust Co., or Chemical Bank, it will go to the State of New York to finance projects that benefit the citizens of New York, solely because these financial intermediaries are incorporated and chartered in New York.

In none of these circumstances will the interest payments be returned to the State of Missouri to benefit the citizens and taxpayers, even though Missouri taxpayers' money was used to make the payments in the first place.

This is wrong and I believe it is unfair. There is no just reason why Missouri bond money should be used to finance projects or balance the budgets of New York, Delaware, or Massachusetts; and no one who testifies in opposition to the bill can demonstrate otherwise. The money should be returned to the people of Missouri.

Similarly, there is no just reason why unknown owners' unclaimed dividends paid by companies headquartered in Missouri such as Anheuser-Busch, McDonnell Douglas, and Monsanto should go to New York, Delaware, or Massachusetts.

Members of the subcommittee, I ask you to substitute the name of your State for Missouri in my example. I ask you to evaluate the fairness of the current rule. I am familiar with the arguments raised by opponents of the bill and I urge you to reject them.

New York, Delaware, and Massachusetts have argued that enactment of H.R. 2443 would be akin to making them disgorge revenues earned from their natural resources. This is topsy-turvy, for the funds raised by Missouri taxpayers and corporations headquartered in Missouri are Missouri resources no less than the shorelines of Delaware and Massachusetts are Delaware and Massachusetts resources and the Broadway theater industry of New York is a New York resource.

Unclaimed property laws generally return property to the States with the strongest ties to the property. The owner-known intangible property is returned to the State of the owners last known address. Owner-unknown intangible property is returned to the State of origination, and real property is escheated by the State in which the real property is located.

The *Delaware* v. *New York* rule regarding owner-unknown unclaimed securities distributions departed from this policy. It is an aberration from these rules.

The intermediary holding the unclaimed dividends and interest is merely a conduit, trying to transmit the funds from an originator to an owner. The intermediary is neither the owner nor the originator of the funds. Thus, it is highly appropriate for this subcommittee to address this category of property, just as it addressed money orders in 1974 after a Supreme Court decision in which all of the unclaimed money orders funds went to just one State, New York.

There is nothing unfair about requiring New York to disgorge to all States monies it has taken since at least 1972. The Supreme Court has required New York to disgorge the funds it wrongfully seized; and the Special Master in the case—then the dean of the University of Virginia Law School—rejected New York's contention that disgorgement would be unfair. The Master noted New York's purported "hardship represents a calculated risk it has imposed on itself, and requiring it to disgorge is not an unjust surprise or unfair burden."

Since New York must disgorge, the question before this subcommittee is whether New York should be permitted to disgorge to Delaware and Massachusetts alone or to all the States on an equitable basis.

Industry opposition should not be allowed to derail H.R. 2443. Banks and brokerage firms presently pay owner-known security distributions to all States. Thus, they already track and comply with the unclaimed property laws of the 50 States, as they do not know to which States they will have to report in any given year.

The notion that the banking and securities industry will become subject to State audits under H.R. 2443 is ridiculous. Allocating funds among all the States instead of concentrating funds in three States will reduce—not increase—their audit risk.

Except for the fact the largest out-of-State brokerage firms filed unclaimed property reports with, and remitted owner-known property to, the State of Missouri during the past 5 years, none has been subjected to audits by the State of Missouri. In fact, Missouri has never conducted an out-of-State audit.

Industry concerns about liability and audits for the past is also a red herring.

Under H.R. 2443, neither the banking nor the securities industry must disgorge past monies already paid to New York. Only New York must do so. Thus, there is no burden on the industry for the past.

And while the bill imposes requirements on the industry with respect to dividends and interest accruing in the future, we are talking about one of the most sophisticated, computerized industries in the world. The Special Master stated that his recommendations, which are embodied in H.R. 2443—and I quote again—would be "simple and inexpensive to implement."

Finally, the subcommittee should know the 47 States have offered to work with industry representatives in order to address their concerns. Our counsel traveled to New York at least twice. His response has been to stonewall our offer to accommodate their administrative concerns. Nevertheless, our offer remains open.

Our purpose is not to create a burden on the industry and we do not believe H.R. 2443 creates any such burden.

The Supreme Court, which you heard so much about today, has invited Congress to overturn its decision, and to substitute a fair Federal legislative rule for an inequitable Federal common law rule.

In 1974, Congress overturned the Supreme Court's money order decision which gave all unclaimed money orders to one State—New York. I urge the subcommittee to expeditiously take the first step in doing so again and place it before the full committee and before the Congress. Then we may get some satisfaction.

[The prepared statement of Mr. Holden can be found in the appendix.]

Chairman NEAL. Thank you, sir, very much.

Ms. Brown.

STATEMENT OF HON. KATHLEEN BROWN, TREASURER, STATE OF CALIFORNIA

Ms. BROWN. Thank you very much, Mr. Chairman, members of the subcommittee.

I am Kathleen Brown, treasurer of the State of California. I will keep my remarks simple and brief.

I believe Treasurer Holden has made a very persuasive case as a treasurer. I welcome the chance to speak in favor of H.R. 2443, the Equitable Escheatment Act of 1993. This is albeit a contentious issue, I think it is a commonsense proposal that will lead to the equitable return of millions of dollars in unclaimed dividend distributions and interest payments to 47 States including California.

It does not make sense nor is it fair under the basic common law of escheatment that unclaimed dividends revert to States where financial intermediaries or middlemen are incorporated instead of States where funds originate. It does not make sense nor is it fair under the basic common law of escheatment that just 3 States, New York, Delaware, and Massachusetts, have divided up $1 billion in unclaimed dividend and interest distributions while the remaining 47 States have collectively received less than $2 million.

Nor does it make sense nor is it fair under the basic common law of escheatment that 3 States will be allowed to divide up between $100 million and $150 million annually while the 47 other States collectively receive less than $300,000.

It does not make sense nor is it fair under that basic common law of escheatment that 3 States collect money from taxpayers of all States just because the brokerage houses, depositories, and banks are located in their jurisdictions.

H.R. 2443 would fairly and equitably resolve this issue by distributing close to $1 billion of unclaimed dividend and interest distributions to the States where the funds originated.

As California's treasurer, I have a particular interest in this legislation. Roughly, 13 percent of the Nation's shareholders are Californians. Ten percent of the Nation's largest public corporations have their principal executive offices in the Golden State and yet California receives only 1 to 2 percent of all unclaimed dividend distributions; and that just does not make sense nor is it fair.

If passed, the Equitable Escheatment Act would result in an estimated $100 million reverting immediately to California and $10 million reverting annually thereafter. This money would go into the States unclaimed property fund which can be used for general fund purposes. With our budget deficit—it would be estimated between $3 billion and $6 billion—every tax dollar counts. I believe California deserves its fair share of unclaimed dividend and interest distributions.

Finally, I hope and urge that you do act before the Supreme Court enters a final judgment in this case. All 47 States will lose out if action is not taken and California will lose an estimated $100 million.

I am aware that banking and securities industries representatives will argue that this will be an administrative nightmare. This stands in striking contrast to the can-do attitude which is displayed by all of those representatives when they come to California and urge California to confer business upon them in the securities banking arena. For a sophisticated industry that deals in millions and millions of dollars, I believe they can figure out how to fill out an unclaimed property form for 50 States by simply referring to the annual information returns or 10(k)s filed with the SEC.

I urge you to fight to ensure that a fairer and more just policy is enacted to return money rightfully owed to 47 States including California.

Thank you for your time and your attention.

[The prepared statement of Ms. Brown can be found in the appendix.]

Chairman NEAL. Thank you.

Now we would like to hear from Ms. Scibelli

STATEMENT OF PAQUA SCIBELLI, STATE OF MASSACHUSETTS

Ms. SCIBELLI. Thank you for giving me the opportunity to address you today. I am an assistant attorney general with the attorney general's office of Massachusetts and I am here representing the treasurer's office of the Commonwealth of Massachusetts.

I would like to highlight some important reasons why we fiercely oppose this legislation in Massachusetts. First, this legislation would require Massachusetts retroactively to disgorge hundreds of millions of dollars that we have lawfully escheated. We have followed in Massachusetts three decades of established law, and you have heard testimony here from proponents of this bill about how this is a bill about fairness.

Well, I ask you: Is it fair to penalize Massachusetts for following the law? And this is the same law that the Supreme Court upheld in 1993, the same law that every State in this Union has abided by in the last three decades; and no one has contested this until recently.

I ask you to consider that: Is that fair to Massachusetts?

Also, I would like you to consider that this bill will open the door to other so-called equitable legislation. Why shouldn't we also force other States to share their oil, gas, mineral, or timber revenues? Why are we singling out Massachusetts because it has a certain revenue source here which is financial institutions? We do not have others.

Massachusetts has historically created conditions for the development of financial institutions. Should we now be penalized for that? Why don't we have bills to redistribute the wealth of oil, gas, and mineral States evenly among all States?

For example, why don't we require the disgorgement of oil and gas severance taxes collected by States? There are citizens in Massachusetts that have used energy, perhaps more than in other States. I don't have the statistics on that.

It seems unfair to me prospectively for this reason: That we are penalizing Massachusetts and States for certain industries that they have and we are also opening the door to large-scale, equitable-type legislation that will erode State sovereignty rights.

Also, we should allow time to let the States resolve these issues in litigation and negotiation. Massachusetts has been negotiating with New York, and we believe we have agreed on principal terms, and within 2 weeks we believe that we will have a settlement. We sincerely believe that all the intervenors in this case can settle this without legislation; and we would advise that everyone try to do that; and we have, you know, done that.

I would like to make a few more points. One is that there is no real public benefit to H.R. 2443. If the benefit was to find lost owners or better administration, that would be something that—a goal we could work toward; but it is simply a redistribution of States' wealth.

Also, in Massachusetts we have worked for the last three decades to foster smooth relationships among the States and with financial institutions to make sure that beneficial owners do get their property back.

What H.R. 2443 will do is disrupt that effective precedent and create litigation among States. It will create administrative costs for every State. It will require every State to open its offices to the audit of every other State; and this is in addition to the burden and cost to the banks and brokerage houses. I don't have to go into it.

You will hear testimony from the SAA and ABA about the costs that this will bring to them. These costs will be borne by the citizens of each of your States that have banks. You will hear from them what the costs are and why they have opposed this legislation.

Instead of fostering cooperation among the States that we have had—in Massachusetts we have reciprocal agreements between our abandoned property division and other States' abandoned property divisions to find rightful owners of the property, and when we cannot find the rightful owners, which is what this property here is all about, it is about unknown—we do not know the beneficial owners, there are no addresses, this is the only property we are talking about here. It is a small amount. It is 0.02 percent of all dividends and interest that are paid

It is also the municipal bonds' interest that are part of this, that is also a very small amount. Every State can enact its own laws to get that municipal bond interest. They do not have to be here enacting Federal legislation.

Thank you.

[The prepared statement of Mr. Malone, submitted by Ms. Scibelli, can be found in the appendix.]

Chairman NEAL. You mean if, for instance, North Carolina passed a law saying it wanted its escheatable funds that New York is taking now, that all it would have to do is pass a law?

Ms. SCIBELLI. I believe as far as municipal interests goes, that each State can pass a law that it can get municipal bond interest.

Chairman NEAL. Let me ask about this, if I may. How would you respond to Ms. Brown's comment that it does not seem fair to her that money from the taxpayers of all the States go to three States?

Ms. SCIBELLI. Well, I think if you look at the statistics—and we have analysis of claims, these are claims made to New York of rightful owners of this kind of property, and what we have heard is that 90 percent of those claims were from financial institutions that are located in New York, Massachusetts, and Delaware. This money basically belongs to these financial institutions; so far the goal is to return the money to the beneficial owner. Then we are serving that goal with the current law.

Chairman NEAL. Ms. Brown.

Ms. BROWN. Why are they protesting so much? If it is served—because the law would set forth an equitable distribution based upon an escheatment principle; and if the figures that were referred to would provide that a New York company with its principal place of businesses in New York, then they would be receiving those dollars, I wonder why they protest so much?

Chairman NEAL. Just on that narrow question, she claims that—Ms. Scibelli claims that the beneficial owner is in fact these financial institutions. And if they are the owner, why shouldn't that State get the money?

Ms. BROWN. If they are holding those——

Chairman NEAL. The State where they are located get the money?

Ms. BROWN. The financial institutions may be holding these funds in their street name and do not have the actual purchaser's name; and the financial institutions may have claimed funds because the true owners have failed to come forward with their claim.

Chairman NEAL. Well, I just must say I don't understand yet—we have been told that that is not the case; what we have been told here today, as I understand it, is that 98 percent of these funds are the property of financial institutions. They are not the property of some——

Mr. HOLDEN. But that is owner-known. What they are talking about is owner-known. What we are talking about in this legislation is owner-unknown. That is——

Mr. CASTLE. My understanding is they talked about all owner-unknown. Then you talk about 97 or 99 percent of the owner-unknown. You already are in the classification of owner-unknown.

Mr. HOLDEN. No. The discussion I heard earlier today from several panels, it seems to me they were mixing up what is unknown property and what is known property. What we are talking about, what this legislation talks about is owner-unknown property. We do not know who the ownership of that is.

Ms. BROWN. If the true owner has come forward to make that claim from their financial institution, then the financial institution would be the beneficial owner. But it is not clear at all from the information we have been provided that that class of unknown owners is that large. We understand it to be far greater than the amount that has been suggested by the testimony given by the representative of the treasurer of Massachusetts.

Ms. SCIBELLI. May I respond to that?

It is true that the statistics we are talking about are about—they refer to claims by rightful owners. But since we do not know who the unknown claims are, we can assume they would be in the same percentages. That is the argument I would make.

If we know 90 percent of the claims are from financial institutions and we know there are all these other unknown claims out there, we can assume if we did know who they were, that they would also be financial institutions. I think that is a fair assumption to make.

Mr. HOLDEN. I don't think you can assume that at all. First of all, some of those other brokerage houses may be working on behalf of their clients. They may not be working on behalf of them at all. I don't think you can—I will not accept that assumption.

Chairman NEAL. Mr. Castle, you discussed this at some length. I go back to Mr. Castle. He has been involved with this issue for many years.

I am still unclear on this point. What would you say about who does this property belong to?

Mr. CASTLE. Let me ask——

Chairman NEAL. As between individuals, even though unknown, and financial institutions? I think you said over 90 percent of it belongs to financial institutions.

Mr. CASTLE. Yes. I believe it does. I will defer to the next panel who are the experts. This is a tricky subject. I am not trying to trap anybody. I sympathize with anybody trying to deal with the subject of escheatments.

My understanding is that the financial institutions have received from the issuers of the stock of various corporations, usually dividends or other receipts in the form of cash, whatever it may be. There is no known benefit or the beneficiary already has been paid or there is no known beneficiary. This has now become the property of the financial institutions. They already have paid out to the proper people.

As soon as they receive it by accounting, automatically they pay out to the stockholders, whoever it may be. What happens is you get an account between the financial institutions that gets out of balance. It is a very small fraction of this, it is what, two one-hundredths of 1 percent or something like that? So it is a very small part of it.

If it happens because there is a float as Merrill Lynch sits down with Dean Whitter at the end of the day and they figure out who sold 10,000 shares of General Motors stock, 10,300 shares of General Motors stock, there is a float also. These dividends are committed at that point. It is in those accounts that we are dealing with. It gets lost, is my understanding. It gets lost as to whoever the original owners were. They can trace back the corporate, the original corporate issuer.

I have not tried to deny that here, as I understand it, they can do that. But it is in their accounts between the financial intermediary that the problem comes in where this money is left uncertain as to whose it is. Then at the end, when their accounts don't balance out, it is escheated at some period of time.

That is my understanding. That is why I think it becomes a very, very—a problematical area in determining rights of ownership, whose blood, sweat, and tears went into it. Because I think we really need to absolutely 100 percent understand exactly what dollars we are dealing with. We are dealing with a very small percentage of all these escheats in this country in this particular category. Before we are done today, if we cannot get it done, I would like to absolutely understand exactly how those dollars flow into——

Chairman NEAL. That is a very key point, it seems to me.

Mr. CASTLE. Absolutely.

Ms. BROWN. We will be happy to provide you with the basis of our understanding. It is our understanding that once you separate property where you know the owner from property where you do not know the owner, that there is a significant portion of that money where there is a known or an unknown owner who would be outside of the financial institutions. We would be happy to provide you with the additional data we relied upon in coming to the conclusion that this is in the interests of an equitable and fair distribution.

Mr. CASTLE. Fair enough.

[The information referred to can be found in the appendix.]

Chairman NEAL. Your testimony is based on the understanding that the majority of these funds that we are talking about here are not owned by financial institutions. But, in fact, they are owned by individuals who cannot be located.

Ms. BROWN. That is absolutely correct. That is why I have been here all day, come across the country.

Chairman NEAL. Mr. Holden, is that your opinion?

Ms. BROWN. And raised the issue to this level.

Chairman NEAL. Ms. Scibelli.

Ms. SCIBELLI. That is not my understanding. I am relying on this report by Nelson Kebler that shows 90 percent of the owners of those unknown amounts in dispute are financial institutions in New York, Massachusetts, and Delaware. I think we have a disagreement here.

Chairman NEAL. Mr. Huffington.

Mr. HUFFINGTON. I want to make a comment that certainly in cases of brokerage houses, many individuals have their stocks and bonds in street names. It is also well known in America we have a large percentage of population in this country that moves every year. I know for certain people who have lost track of their bank accounts, their stock ownership, dividends. Maybe small, three shares, maybe not a lot of money. A hundred dollars in the bank. They thought they closed it down. They hadn't.

My guess is there is a significant proportion that is in fact individually owned through street name and that is the problem. They cannot find the people. They have sent out the check. The check comes back. It sits there. It seems to me—by the way, I want to welcome our treasurer from California. Kathleen Brown is a friend of mine. I am delighted she is—we happen to be in opposite parties but we agree on this issue.

It is a matter of fairness. It makes no sense that financial institutions in three States, the three States can keep 98 percent of the money. It makes no sense. I have not heard one good argument why three States should keep all that money.

Chairman NEAL. Mr. Huffington, may I say to you, that what we have heard all morning—I know you have had to be gone—what we have heard over and over again is that the money in question here is not what you are talking about, and that the beneficial owners have been found. Everyone, all or 90-some percent of the beneficial owners have been found and paid, and that is what is in question here. I am not taking this position. I am trying to understand. I just wanted you to be clear.

Mr. HUFFINGTON. I am fully clear. I am talking about the $100 million to $150 million that has not been found.

Chairman NEAL. That is what I am talking about.

That $150 million, it has been asserted over and over again today, is comprised of funds that are—that, for instance, may be dividend funds, and the transactions at issue are between two financial institutions. We are talking about not instances that I think you have in mind, or frankly that I had in mind where there is an individual who we are not able to locate somehow and not able to pay him that fund.

What has been asserted here over and over again, and Ms. Scibelli is asserting it at this point, is that the money in question here, that $150 million that is—I am sure not sitting anywhere in New York, but which has worked its way through that system somehow, is not that kind of funds at all. It is entirely different. It is funds that are contested funds between two financial institutions and they are not the property of individuals but the property of one or more of these financial institutions.

Mr. HUFFINGTON. Mr. Chairman, someone moves, doesn't get their dividend check.

Chairman NEAL. That is a different category we are being told. I am not saying that is right. I am saying that is what we are being told. This is certainly—I must say—an issue I don't understand.

Mr. CASTLE. If I may try to explain it?

Ms. SCIBELLI. Mr. Chairman, may I say you are right about that. Those comprise 99.98 percent of all interest and dividend claims. Those are beneficial owners who have been paid already. That is not what we are talking about here.

Mr. CASTLE. That is under the primary theory of this whole thing, which is that that 99.98 percent people aren't identified, they cannot be identified. You know their last address. It goes back to the State. We are dealing with this narrow category of two-tenths of 1 percent where the ultimate beneficiaries are totally unknown. We don't know address or anything. They usually can trace back apparently where the original stock issuance came from, which is the argument some of the treasurers make. Nobody really knows to whom it would be paid. It is usually an accounting problem between financial institutions. You can still make the arguments. I want to be sure we have our facts straight.

Ms. BROWN. In California alone, we estimate prospectively it would amount to in the neighborhood of $10 million.

Mr. HOLDEN. In Missouri about $2.5 million.

Mr. HUFFINGTON. A year?

Mr. HOLDEN. A year.

Chairman NEAL. Ms. Scibelli, let me ask you, this percentage of claims by brokerage houses, what percent are made on behalf of the brokerage house and what percent on behalf of individual investors?

Ms. SCIBELLI. The way I understand it is what the brokerage houses, they pay out the dividends they pay out. So the beneficial owner, the claimant, has already been paid; by the time the brokerage house makes this claim, I think this has to do with the way their accounting procedures are done. So that when they do make these claims, that they belong to the brokerage houses.

Chairman NEAL. They are making them for themselves?

Ms. SCIBELLI. Right.

Chairman NEAL. There clearly is disagreement over this point here. We will have to try to work it out.

Are there any other questions?

Mr. Castle.

Mr. CASTLE. I just have one question. We are trying to talk about fairness. I think we are making an effort to determine what this is. It is so technical and so important to understand it.

Ms. Scibelli made a point and I would like to ask Ms. Brown and Mr. Holden their views on this. I think this is a valid fairness point, too. It is probably—doubly true where I am from.

These States, New York, Massachusetts, Delaware, have collected money under escheats. We are talking about going back 30 years in this legislation. They have collected for all these years. They have collected legally, collected pursuant to Supreme Court decisions. No question about that. They have an absolute demonstrable right to be able to take that money and spend it as part of their revenues. If the rightful owner ever came along, they have the obligation to reimburse them. They have done this forever.

Apart from whether it is prospective or not, the whole retroactive part, which I think has constitutional and legal problems, I think there is a fairness issue here, too.

I am not trying to pick on California. I voted for the emergency appropriations. I think at some point there has to be—somebody has to put up the flag and say, Hey, give these States a break. They did it legally. If we change the law, let's look forward prospectively and not retroactively. I am asking for your views.

Ms. BROWN. I am happy to respond. I am very appreciative of the support that was given to California after the earthquake. I feel very strongly California must continue to reciprocate when other States have had emergencies. So we are extremely appreciative.

First, we are not talking about Federal dollars in terms of distribution.

Second, with respect to the issue of fairness, I really go back to what Governor Richards said a few hours, I guess, ago when she said you have to understand the nature of escheatment law specifically. Whenever you hold unclaimed property, you are always holding that property awaiting a higher claim. In the State of California, under our own escheatment laws, after a statutory period of time, the funds revert to the State.

Mr. CASTLE. That is not fair.

Ms. BROWN. Wait. Let me finish. We give back 50 percent of the money that escheats into the general fund when an individual comes forward who has that rightful claim.

So in the whole law of escheatment, there is this notion of you are not an owner; just because you spend it does not make you an owner. You are a holder until a higher authority is identified. I think that that is what we are asking for resolution.

Clearly, there is disagreement about the issue of retroactivity. I think that one can bifurcate the retroactive issue from the prospective issue. But we have never had a congressional hearing to talk about this issue prospectively until we joined the entire issue.

Mr. CASTLE. I don't think anyone ever thought the higher claim that they were referring to in that earlier discussion was the Congress coming in and changing the laws around so they could get back 30 years to make claims on this known. The higher claim is a beneficial owner who can be identified. That is as unfair an answer as I heard in a long time.

My view is that you are essentially stating the States had every legal right under any interpretation of any law in the history of this country right up until today in which they have properly taken and properly spent, and now you are going back and saying, I don't care if it is Federal money, escheat money, it is money that went to the States. Now you are saying you have to disgorge all of that money because the Congress is going to pass this law changing the fact that in this little two one-hundredths of 1 percent, it is no longer going to be the State of incorporation or the place where the securities were held; it will be the place where the corporation headquarters were.

There may be legal and constitutional arguments going forward. I have some real problems, and I am absolutely sure there are legal problems in going backward. I hope as a matter of fairness that would be dropped before this hearing ends today. It is so inherently unfair.

Maybe you didn't understand. I don't mean to attack you. I disagree with your conclusion on that. I hope you would rethink that.

Ms. SCIBELLI. May I say in terms of fairness, I would be very surprised if California's treasury in the last—still has all the abandoned property money and escheats they collected over the last 30 years. I don't think any State has that. Massachusetts surely does not.

Of course, we pay claims; but as you said, you pay 50 percent; we pay more than that in claims. But that still leaves the other 40 percent. That is what this money is part of. If there are no claims, this money is spent. Every State does that. That is the reality.

Mr. HOLDEN. I also want to echo what the treasurer of California said. If you would clarify for me on the one point, on the *Delaware* v. *New York* case, was any of that money that New York is going to be paying back to Delaware, is that retroactive funds or all prospective funds?

Mr. CASTLE. I was not paying attention.

Mr. HOLDEN. I was going back to the *New York* v. *Delaware* case. Are any of those funds tied into that settlement which I have not seen, that I hope the subcommittee as well as other people will be allowed to see that.

Chairman NEAL. Your question is whether or not any of that money is money that was gained from a retroactive interpretation of the law?

Mr. CASTLE. The answer to that is, it is basically retroactive money, involves interest, damages, other things. It also stated the other States are not entitled to any of that money whatsoever because they were not legally entitled to it, but Delaware was. So it is a legal entitlement based on the law as it already existed over all those years.

Mr. HOLDEN. It was retroactive then, in that regard. Just for New York and Massachusetts and Delaware's benefit, they will have to look at the case, a 1974 case, on money orders to see what the Congress did in those circumstances after the Supreme Court decision, and have some indication of where the law may be or where Congress may be intending to go in the future. I would think that that would cause at least some concern or pause about what they were doing in the way of expending those funds.

In addition, there is another element of funds here we have not talked a great deal about, which is called the float, which all of those States have been making a sizable amount of money off of. That is outside the unclaimed property, unknown category we have been talking about. They have been doing financially quite well.

Mr. CASTLE. Delaware doesn't have the float.

Ms. SCIBELLI. May I respond?

Massachusetts also has claims on money New York has taken, but that is a little different from what we are talking about here. That is pursuant to the same rule that has been in effect for the last 30 years. New York was violating a law of the last 30 years. That is why they owe Massachusetts damages under the lawsuit and why they owe Delaware damages.

We were following the law for the past 30 years. That is the difference.

Chairman NEAL. That is a significant difference. It is also interesting to point out in this context, though, as was indicated earlier by several people that New York was quite happy to settle with the States. They are settling with Massachusetts and Delaware. They are not settling voluntarily. They are settling because the Court said they had to, for whatever that is worth.

I want to thank this panel. We have a vote underway.

Mr. HUFFINGTON. Thirty seconds.

Chairman NEAL. OK.

Mr. HUFFINGTON. The last comment is—that I want to thank all of you for coming. This is an important issue. These funds are unknown in terms of who owns them. So the question is, do the banks and the financial institutions own them or do the people of the country own them; that is, by paying them back to the States. That is why we are having these hearings.

If they are unknown in terms of ownership, they are unknown. That doesn't mean the financial institutions have any inherent right to own them. I think that is something that should be discussed at the hearing. We are having that full discussion on both sides of the issue.

I am delighted you are having hearings, Mr. Chairman.

Chairman NEAL. Thank you all very much. You have been a big help.

We have two votes in the House. They shouldn't take too long. The first one will occur in 7 minutes and the other one within 5 minutes after that. We will be back here in about 20 minutes. We will suspend until 10 till 3 and hear from our final panel at that time.

[Recess.]

Chairman NEAL. I would like to resume our hearing. I want to apologize to the panel for taking so long with the other panels and delaying you so much, and I want to thank you for your patience in staying with us here.

This is our last panel and it includes Mr. Jeremiah O'Connell, Jeremiah Associates, Ridgewood, New Jersey; accompanied by Mr. Howard Spindel of Integrated Management Solutions, New York, New York; and Mr. Thomas Tremaine of Raymond James & Associates of St. Petersburg, Florida.

Gentlemen, thank you again for being with us and for having so much patience. We will put your entire statements in the record and ask you to summarize, and we will recognize you in the order in which I mentioned you, unless there is some objection.

Mr. O'Connell

STATEMENT OF JEREMIAH O'CONNELL, JEREMIAH ASSOCIATES, RIDGEWOOD, NJ

Mr. O'CONNELL. Mr. Chairman and members of the subcommittee, thank you for providing us the opportunity to appear before you today to discuss the role of financial intermediaries, the origin of unclaimed securities distributions, and the ability of the securities and banking industry to implement H.R. 2443.

Together, Howard Spindel and I have more than 50 years experience in the industry, are on the faculty of the New York Institute of Finance, and are founders of independent firms that provide consulting services to the industry.

Each of us is particularly expert in how dividends, interest payments, and other distributions are processed by banks, brokerage firms, and depositories.

Drawing on our knowledge of securities processing, we carefully analyzed H.R. 2443 and each of us has independently concluded that the legislation could be readily implemented in a cost-effective manner.

At the onset, we note there are two principal reasons why distributions have become stuck at banks, brokerage firms, and depositories and end up being escheated.

First, intermediaries sometimes receive more funds than they anticipated because certificates are not registered out of their name in a timely fashion after a trade is made. The other reason is errors. These causes and the role of financial intermediaries are discussed in more detail in our written statement which has been included, and will also be discussed in more detail by Mr. Spindel right after I finish.

Intermediaries that receive these overpayments almost without exception know the identity of the issuer of the security in which the distribution was paid. We now turn to the ability of the securities and banking industry to comply with H.R. 2443.

For many reasons we have concluded that the industry can readily implement the legislation. The industry is extremely advanced technologically as it must be to process the trading of tens of billions of shares annually. Banks, brokerage firms, and depositories have highly sophisticated computer systems that are constantly being upgraded.

Two preliminary factors limit the impact the bill will have on the securities and banking industry. First, brokerage firms and banks currently turn over owner-known unclaimed securities distributions to the State of the last known address of the owner.

Thus, brokerage firms and banks already track and comply with the requirements of each State's unclaimed property laws.

To comply with these laws, many banks and brokerage firms use outside vendors such as the Clearinghouse Reporting Service and the National Abandoned Property Processing Co., that prepare and oversee the reporting and remitting of unclaimed securities distributions.

These vendors can assist brokerage firms and banks with respect to owner-unknown distributions.

Second, the number of intermediaries that will be affected by H.R. 2443 is small. The potential number of firms that could be impacted by the bill is not the total NASD membership of about 5,000 brokers, but is the several hundred clearing firms. The even smaller number of clearing firms regulated by the New York Stock Exchange, about 175, account for more than 90 percent of the securities held by broker dealers.

Clearing firms are firms that clear for themselves and have the operational and systems infrastructure in place or available to them to process securities transactions for clients, which include other brokerage firms that do not clear for themselves. Likewise a limited number of large banks process securities transactions on behalf of the majority of other banks.

Further many more clearing firms and banks do not use their own systems to process securities activities. They instead utilize service bureaus that furnish the facilities, including computer systems for securities processing. The many brokerage firms and banks that utilize the service bureaus or their software would not have to make any change to their systems to implement H.R. 2443. The service bureaus would effect the change for their entire client base.

The location of the principal executive offices of issuers of securities can readily be identified by both service bureaus and clearing intermediaries. With rare exceptions, the State of the principal office of publicly traded companies that pay distributions is identified in forms they are required to file with the SEC. And the State of the principal executive offices of State and municipal issuers can easily be identified and cannot be subject to dispute.

Also bear in mind that the securities and banking industry spends immense sums of money every year maintaining and enhancing their computer systems. Any incremental cost in upgrading the systems for purposes of implementing H.R. 2443 would be negligible and less than the annual change to conform to our ever changing securities regulations and tax laws.

The following are alternative ways through which intermediaries can comply with H.R. 2443. First, among the information maintained on computer data bases operated by Standard and Poors, Disclosure, and other firms is the principal executive offices of issuers of securities. These data bases are currently used on-line by brokerage firms and banks for many different aspects of their business.

Clearing firms, banks, and service bureaus could retrieve on an on-line basis from these data bases the principal executive offices of issuers of owner-unknown distributions. Another approach is for clearing firms, banks, and service bureaus to add the principal executive officers of issuers to their securities data bases. Through their software systems, clearing firms, banks, and service bureaus can establish a computer link between the CUSIP number and the principal executive office of issuers.

The needed information can be obtained by, among other means, downloading principal executive officers' information from databases or purchasing data bases on compact disk.

Clearing firms, banks, and service bureaus could make accompanying one-time modifications to their systems to make room for the data and permit its acceptance, application, and maintenance. The cost of making this link would be a negligible percentage of an intermediary's computer budget and is no different than the cost of an intermediary's complying with the frequent changes in security regulations and tax laws.

Maintaining a current list of principal executive officers when, for example, an issuer changes that location is a simple task, and would be processed in the same manner as numerous other changes.

The deciding factor as to how precisely to comply with the legislation would be determined by each intermediary based upon its unique needs and the alternatives most appropriate for a particular situation.

For many reasons, therefore, brokerage firms and banks can readily and cost effectively comply with H.R. 2443.

One, they already track and comply with the unclaimed property laws of each State with respect to owner-known property.

Two, they are assisted in complying with unclaimed property laws by outside vendors expert in those laws.

Three, only a small minority of brokerage firms and banks clear securities transactions and would therefore be affected by the legislation.

Four, many clearing firms and banks use service bureaus to process transactions further reducing the number of companies that would have to adjust to the legislation.

Five, through data bases currently used by the securities and banking industries, clearing firms, banks, and service bureaus have ready access to principal executive offices' information.

And finally, the securities and banking industry is extremely advanced technologically and is well equipped to accommodate the legislation in a cost-effective manner.

Chairman NEAL. Thank you, sir, very much.

Mr. Spindel.

STATEMENT OF HOWARD SPINDEL, INTEGRATED MANAGEMENT SOLUTIONS, NEW YORK, NY

Mr. SPINDEL. I would like to add some remarks based upon some of the remarks that I heard here earlier today, Mr. Chairman, and that is with respect to the holders of the owner-unknown property.

Yes, it is true, that sometimes financial institutions will hold property that might very well belong to other financial institutions, but that is mere speculation. The property is not—the owners of the property are not known. And in fact, generally speaking, with respect to claims between financial institutions, most of the claims come through against other financial institutions that are holding property very, very early in the process, immediately after the payable date of property.

By the time that securities distributions escheat to the various States, which might be 3 to 5 years later, most of the sophisticated entities in the process, the so-called other financial institutions, have already made claims for monies that might be owing to them.

Once the money escheats, it escheats to these various other States. At that point in time, a good many of the claims might very well be initiated, perhaps, by owners—beneficial owners of the property who were not aware of the fact that they were owed the money earlier on when the process first began.

So to summarize what I have to say, basically we don't know who the claims are being made—on whose behalf, rather, the claims are being made. What we do know is that sometimes retail customers will be making claims. Sometimes financial institutions will be making claims, but they probably are making many of those claims, if not the lion's share of them for that matter, and I can't really speculate, based upon claims that are initiated against them by their own customers.

[The prepared statement of Jeremiah O'Connell and Howard Spindel can be found in the appendix.]

Chairman NEAL. Thank you, sir, very much.

Mr. Tremaine.

STATEMENT OF THOMAS R. TREMAINE, RAYMOND JAMES & ASSOCIATES, INC., ST. PETERSBURG, FL

Mr. TREMAINE. Chairman Neal and members of the subcommittee, my name is Thomas R. Tremaine and I am vice president and comptroller of Raymond James & Associates, a broker-dealer incorporated in the State of Florida.

I am appearing here today on behalf of the Securities Industry Association. Before I begin, I want to thank the subcommittee for the opportunity to appear and comment on the impact of the proposed legislation.

We see several groups that will be affected by H.R. 2443. The actual owners of property that becomes lost or is deemed to be abandoned, financial institutions that process security transactions, and the 50 States.

We think there is a serious question as to whether any of these three groups can be said to be benefited more than they are hurt by this bill. In two cases, the financial institutions and the individual investors, we believe that the impact is going to be uniformly negative.

The subject of the act is property that cannot be traced to a particular account or customer. This is commonly referred to as owner-unknown property. In fact owner-unknown property is not exactly correct because most of this property belongs to the financial institutions themselves.

It is standard practice in the securities industry that customers virtually always receive the payment of dividends or interest that they are entitled to regardless of whether their broker has received the dividend or interest payment from the issuer.

It is up to the broker that has paid the customer to research where the payment went and to claim it.

Because it tends to be in very small amounts, this is too costly for firms to track down a claim if the broker does not do so. The money sits on some other financial institution's books and is subject to escheat through the holding financial institution's State of incorporation.

One group that will be affected by this bill consists of brokerage firms and other financial institutions such as trust companies and banks that will have to comply with this legislation.

In the past, brokerage firms and banks who hold unknown property have generated a list of unclaimed property on an annual basis. They send the list to the abandoned property office and the broker's or bank's State of incorporation, and then send in the property. It is a relatively efficient operation.

If the bill becomes law, the burden of compliance for financial institutions becomes substantially more complicated, more time consuming, and more costly.

Under this legislation, brokerage firms, and banks that handle their own abandoned property compliance will be required to become familiar and comply with the abandoned property statutes of every single State, including those in which they do not conduct business.

In some cases this could increase their reporting fiftyfold. The reporting process would no longer be routine and mechanical. Instead these firms are going to have to pay someone to go through their abandoned property accounts and figure out for each of those very small items, some amount to pennies, who the issuer of security was, who generated the item was, where their general principal offices were located at, the relevant time, what the report is supposed to look like, where it has to be filed, and where and how to send the money.

In addition, financial firm computer systems would need to be modified to keep track of the States of principal executive offices of the issuers for the literally hundreds of thousands of securities. Systems for dividend and interest processing do not now record such information because there has never been any reason to do so. Such software modifications would be extremely expensive for small firms and difficult to implement. It would require them to reconfigure their data bases which may already be overloaded to keep track of a whole new category of information.

Finally, we should examine the effect on the States. The legislation that has been presented is helping 47 States and hurting 3. We think this is a very superficial characterization. It seems likely that the 47 States that have been presented as a beneficiaries of this bill will be spending State taxpayers' dollars fighting over the escheated funds, defending claims, and auditing their sister States in disputes about when and where the particular corporation had its principal executive offices both in the future and because the bill provides for full retroactivity claims going back for years.

We do not know which States will ultimately be the beneficiaries because this kind of information has never been monitored before. This bill represents a complete change in the law.

While the benefit to any particular State cannot reliably be predicted, neither can the cost of the interstate audits, claims, and litigation.

In conclusion, there is no clear benefit for the States since the very purpose of the bill is to allow States to assert claims against each other. It is clear however this bill could hurt the investing public and create an unreasonably costly administrative burden for the financial intermediaries.

Thank you for the opportunity to appear here today.

[The prepared statement of Thomas Tremaine can be found in the appendix.]

Chairman NEAL. Thank you, sir.

Of course, I am curious about something; I have been all day. Why are there so many errors? I mean $1 billion over the last few years, $100 to $150 million a year seems like an awfully large number, especially when the group, the professionals handling this, are among the most sophisticated in our business world.

Who has an answer to that? Yes.

Mr. SPINDEL. Perhaps it is simply a matter of, first of all, not looking at the magnitude of the dollars that constitute the errors. You can look at the dollar amount and say that we have over $100 million a year of owner-unknown dividends, and suggest that that is significant.

I think that the better way of looking at it is to say that the industry is very efficient. After all, 99.98 percent of dividends find their way to the rightful beneficial owners, and I think that signifies that the banking and securities industries are doing a fine job of making sure that people rightfully get their money.

That does not suggest that anybody should sit back and ignore the fact that these monies are escheating; and all of these financial intermediaries certainly make every possible attempt within their power to reunite beneficial owners with their monies when they have a way of doing so.

What is the subject here is simply something that is probably more the result of human error than anything else, and we certainly can't eliminate that completely.

Chairman NEAL. That is a good point. I mean, I said that, only I guess you put it a different way, only 0.2 percent of these transactions are in error even though that amounts to a large number.

Mr. TREMAINE. I think it is actually 0.02.

Mr. SPINDEL. Two one-hundredths of 1 percent.

Chairman NEAL. All right. Now, I am still having trouble and frankly I think even the former Governor who spent many years is having trouble understanding clearly who owns these funds.

Are these funds—I am getting two different pictures of the nature of these funds. One is that these are funds due to owners-unknown who are individual stockholders or bondholders who are due interest and dividends that they haven't gotten.

I am getting another picture here that actually those people I just described have gotten their money, and that the funds in question here are funds that are somehow misappropriated among financial institutions and are therefore owned by financial institutions.

Is one of these characterizations largely correct? I understand that there may be some combination here, but I also am led to believe that one of these descriptions describes the overwhelming majority of what we are talking about. And is there one of you or more that have an answer?

Mr. TREMAINE. Mr. Chairman, if I might. I think the latter is actually the more accurate description. I think Congressman Castle has a good grip on how the process actually does work, as did Attorney General Koppell, and actually Governor Carper who spoke earlier today, the process of these unknown items are really between the brokers, if you will.

Mr. SPINDEL. Mr. Chairman, I would like to respond to that as well, if I may.

With due respect, when Mr. Tremaine made his remarks, just now he had indicated that generally, and I hope I am paraphrasing him correctly, the customers, the beneficial owners are credited with the dividends, and I certainly don't disagree with that to the extent that the financial intermediary knows who those beneficial owners are on the payable date. It certainly credits those beneficial owners with the distributions that are owing to them.

The issue in this particular case is a situation where the owners are not known, where there is an overage of some sort. Those overages can creep into the system through errors, and when there are errors, the financial intermediary is unaware of what those errors might have consisted of.

With respect to the claims process between financial institutions, perhaps in the first month after a distribution, you might have a claims process, heavy claims between financial institutions who are simply claiming distributions that might be owing to them by other financial institutions because of the delivery process throughout the securities industry, but with respect to those that escheat to the various States over a period of time long after the payable dates of the distributions, in all likelihood, many of the distributions have nothing whatsoever to do with financial institutions. In all likelihood, the distributions are owing to unsophisticated ultimate beneficial owners who don't know enough to claim distributions because they just aren't aware of the fact that they were even missing the distributions in question.

Mr. TREMAINE. Mr. Chairman, if I may.

Chairman NEAL. Excuse me. If I may just say on that, you say in all likelihood. Now, this is what we are trying to get at. I still don't know.

The two of you are giving me totally different answers on this. I am sure, it is all in goodwill. I am not questioning that, but it is not helping.

Mr. SPINDEL. What I am saying, Mr. Chairman, is that it is impossible for me to really speculate as to who a particular amount of owner-unknown property may belong to. It is literally a mystery.

Chairman NEAL. I know it says owner-unknown, but it is the category of owner that I am looking for here.

Mr. TREMAINE. Mr. Chairman, that category is between the two financial intermediaries.

Chairman NEAL. On behalf of themselves.

Mr. TREMAINE. Absolutely. The broker pays the owner of the security at the distribution time. The beneficial owner is paid by the broker whether the broker has been paid or not. They make their customers whole.

Chairman NEAL. So you are absolutely certain that this—these owners-unknown are financial institutions on behalf of themselves?

Mr. TREMAINE. Yes, sir.

Chairman NEAL. And not on behalf of individuals or mutual funds or others?

Mr. TREMAINE. That is true.

Chairman NEAL. Mr. Spindel, are you absolutely certain that is not the case?

Mr. SPINDEL. Well, by definition with respect to owner-unknown distributions, one cannot be absolutely certain about who the ultimate beneficiary is. I can tell you, for example, from my own experience, that I was once a comptroller of a firm that had an account at a major New York Stock Exchange clearing firm.

Periodically, every half a year or year, I would go through the records of our dividend receipts on our investments and would identify distributions that had not been credited to the account of the firm that I was working for.

I would then confront the clearing firm and say I am missing a dividend on a particular stock, it might be General Motors or IBM; it could have been any other security that my company had owned. And invariably there were reasons why we were not credited.

Generally speaking, the reasons were because of human errors, because of things that creep into the system. While I respectfully agree with Mr. Tremaine that brokerage houses make every possible effort to credit the customers that they know the distributions belong to on the appropriate payable date, there are many, many instances where this does not occur because of the vagaries of the system.

And those vagaries, even though they are infinitesimal percentagewise, amount to a lot of money.

Chairman NEAL. Well, so you are saying that in your case, your company wasn't paid these dividends or interest payments. But actually, if you are not paid, I would think that that money, since you are the owner of record, would have been paid to you or it wouldn't have stayed with the financial institution, it would have stayed with the company issuing the dividend.

Let's say that IBM mailed you a dividend check and it got lost in the mail, and you went through your process and you found that the check was missing. Now, you would contact IBM. I gather that you weren't having a financial intermediary collect these for you. You were getting these dividend payments directly from the company; is that correct?

Mr. SPINDEL. That is correct.

Chairman NEAL. So let me just follow this up.

Mr. SPINDEL. Yes, sir.

Chairman NEAL. So you are getting it from the company; you are missing a dividend check. You write to them and ask for——

Mr. SPINDEL. May I make—interrupt for a moment?

Chairman NEAL. Certainly.

Mr. SPINDEL. Mr. Chairman, our account was carried by a financial institution, a major member firm of the New York Stock Exchange. Our securities were held in street name by that firm. Upon payable date of a dividend, we would normally have a credit entry put into our account reflecting the fact that the dividend was owing to us, and we did not receive any dividends directly from the issuer.

Now, I am a sophisticated person. I work in the securities industry. I knew that it is important to check to see that dividends are received. I did it periodically because I depended upon the financial institution.

But there are many instances where people less sophisticated than I am or less sophisticated than those people in financial institutions do not bother checking to see whether they have received distributions or whether the amounts that they have received from the intermediary financial institutions are even correct.

They might have received a payment which is less than they should have received, and they would not know the difference unless they made further inquiry. And it is that research that people don't do, and I cannot tell who is not doing that.

Chairman NEAL. Let me see if I can follow through on this. Say at that point the dividend has been paid by the company to the financial intermediary, but for some reason or another the financial intermediary didn't credit that to the correct account or the legitimate recipient didn't get it.

Now, that money has been paid out by the company. It is on the books of the financial institution. Now, by your definition, Mr. Tremaine, I am just curious whose property is that at that point? Is that the property of the financial institution?

Mr. TREMAINE. That is the property of the individual who should receive the dividend.

Chairman NEAL. But now the owner is unknown for some reason.

Mr. TREMAINE. What I would tell you, Mr. Chairman, is what traditionally happens is that the customer is given credit for the dividend on the payable date regardless of whether the broker had received it or not.

Chairman NEAL. We are not talking about that situation. We are talking about another situation now when that person is not given credit and that check has been sent out by the company so they don't own it any more. It is not their responsibility anymore. It didn't go to the intended recipient. It rests in the financial institution.

Now, is that the property of the financial institution? This may just help me. I am having trouble with this. Maybe you are talking about the same thing, but using different words. In your nomenclature, does the financial institution own that at that point and so——

Mr. TREMAINE. No, the financial institution owes that to the rightful owner.

Chairman NEAL. But if it can't find the rightful owner for some reason.

Mr. TREMAINE. I would tell you that—I am not going to take the position here that that never happens. But I would have to tell you, I think that happens very, very, very rarely.

We know, we keep track of our investors that have shares of IBM and when a dividend is paid, we credit them at that point in time. We know the rightful owner.

Chairman NEAL. But it was received by you.

Mr. TREMAINE. Excuse me?

Chairman NEAL. When the dividend is received by you.

Mr. TREMAINE. On the payment date, we pay the customers whether they have received the money or not.

Chairman NEAL. All right. Now, Mr. Spindel what do you say about that? Do you think that happens a lot more than Mr. Tremaine thinks it happens?

Mr. SPINDEL. I would suspect that Mr. Tremaine is correct; that 99.98 percent of the time customers do get paid and that has been the statistic that has been used throughout this hearing today. I don't dispute that at all.

We are talking about the 0.02 percent that amounts to over $100 million a year. And with respect to that portion, we don't really know who is the beneficial owner of that property. Even if financial institutions later on make claims against the escheat fund of one of the States, it is very possible that the claims are being made by the financial institution because the customer perhaps 3 or 5 years later discovered that he hasn't received his dividend, went into the place where he should have received a dividend from, which would have been the financial intermediary or brokerage house or a bank, and said "where is my dividend?"

The financial institution then researches its records, notes that the customer should have received the dividend, and then it makes a claim. In effect, it is making a claim on behalf of a customer, not on behalf of itself. It is making a claim in reaction to the fact that a customer was shortchanged a dividend.

Chairman NEAL. I can see that happening. That is not happening. What I am trying to get at is what is the nature of these claimants and I am still not getting it. The category, not the individual.

Obviously, I know that the owner is unknown or we wouldn't be talking about it.

Mr. CASTLE. Mr. Chairman, I have something I could read. This may help all of us, as you have seen this today. I am struggling with this. This is the statement of Nelson K. Kibler, who I guess was to testify.

It was before the subcommittee, but he is not before the subcommittee, so unfortunately, we can't ask him questions. He is an accounting partner of the financial institution industry group of Deloitte & Touche. Its predecessor was Touche, Ross & Co.

He says on page 21 referring to the 0.02 percent we are talking about: "Most importantly from my experience because of the nature of the transactions that cause these owner-unknown distributions to occur, the rightful owner is usually a financial institution that has not claimed the dividend from another broker dealer in this regard. An examination of a sample of the claims paid by New York since 1985 reveals that 96 percent of the claimants representing 99 percent of the dollars claimed were financial institutions, and of those financial institutions, 90 percent, representing 86 percent of the dollars claimed, were either headquartered or incorporated in New York, Massachusetts, or Delaware."

I think you sort of have touched on that in a way. Some of those may be customer claims going through the financial institutions. I am not sure, but I think you were suggesting that. That may help a little bit. At least showing where we got these.

Mr. SPINDEL. May I respond to that, Mr. Chairman?

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Chairman NEAL. Certainly.

Mr. SPINDEL. I know Mr. Kibler. Well, he certainly is a friend of mine and is a well-respected member of the accounting profession.

I think that he was responding perhaps to the fact that most of the claims that might have been filed with the various States might have come from financial institutions, but he does not know when he looks at a claim coming into New York or any other State whether the claim is initiated because the financial institution was out the money or whether the claim was initiated by a customer of the financial institution which went back to the financial institution looking for a distribution that the financial institution should have made directly to that customer before it escheated to the various States, and that is not reflected at all in what you had just indicated, sir.

Mr. TREMAINE. Mr. Chairman, if I might run through and just read for you a typical example of how this type of property might come about in a transaction.

Upon settlement of the trade, the selling customer's broker may deliver a certificate still registered in its name to the purchasing customer's broker, if the certificate is not reregistered to reflect the new record ownership before the record date of a payment.

The selling customer's broker will receive the distribution even though it did not expect to receive it. What that really turns out to be is that the purchasing customer's broker now has to make a claim on the selling customer's broker. The customer has been paid the dividend in this case.

Chairman NEAL. Well, I understand that entirely and I can see how that can happen. I don't have any question about that happening. I can also see how the situation Mr. Spindel describes can happen. They both can happen, and both do happen, I am quite certain.

My question is what does happen? I mean what is the nature of these escheatable funds? What is the category of owner? Is it more like the kind of transaction you described, or is it more like the kind that you described?

Frankly, at this point, I don't know how to get to the bottom of it. We will work on it, we will sooner or later. We have different opinions on this. And I don't know how to resolve it at this point.

Mr. TREMAINE. I will tell you my experience, it is the item that is between the two financial intermediaries that is the most common of this very small part of the abandoned property.

Chairman NEAL. I think this does impinge on a equitable settlement of this question, and so we will continue to try to understand this. If you see ways to help us understand it, better let us know.

Mr. CASTLE. Mr. Chairman, if I could just ask anybody who is left in this room. I can't believe anybody is, but if you are, if anybody can shed light on this with either studies they know about or whatever because I think it really is crucial to understand exactly what that note or that money is that goes into that escheat.

We know it is that 0.02 percent. We know it is owner-unknown, and that kind of thing. I think it is important to understand the exact procedures by which it gets there, and you have all tried your best. I am not saying anybody hasn't.

To some degree it is a little bit soft in terms of being able to identify it precisely. Maybe just examples of it all would help me at least.

Mr. APALLES. My name is Yeoryios Apalles. I am the deputy attorney general for California. We have been wrestling with this problem for well over 7 years which started this litigation in 1988. And I can assure you that you are not going to find any study that will give you a definitive answer that breaks down this $1 billion fund between the properties covering situations that one gentleman to my far left has spoken about and Mr. Spindel has spoken about.

There really is a great big question mark. What we do know for certain, however, is this: That New York has attempted to prove this point before the Special Master, and the Special Master having received voluminous memoranda, failed to find any merit in that argument. So, frankly, what we are dealing with is really almost an unanswerable question.

The question that has to be addressed then is, how do we equitably distribute these funds, and you have listened to testimony ad nauseam? I will not pretend to repeat this testimony.

Chairman NEAL. I know. But equitable distribution of the funds it seems to me depends on who owns the funds, where the funds came from. I mean that.

Mr. APALLES. And with respect to that question, then, Mr. Chairman, there is no one in this room that will question that these funds came from the corporations issuing dividends and the municipalities issuing the government debt.

Now, that money has been distributed to the financial institutions for internal distribution to owners of record that are reflected in the books and records. It is true that in the clearing process what happens is that a security registered in street name in fact either is misidentified or does not—or is out there in transit, so we don't really know exactly at the point in time the payment is made who owns that dividend.

We do know, however, that it is not the particular institution, any one of the two financial institutions on this point.

Mr. CASTLE. But therein lies the question. You are begging the very question that we need to answer. Are you getting into an accounting situation between financial firms which the issuance of stocks has become a very secondary role player in all this, or are we dealing with actual beneficial owners ultimately or the original issuer, whatever, maybe.

I think you can argue either way you want, but I think that is a very gray area that we are dealing with here.

Mr. APALLES. We are not going to suggest that it is 100 percent black or 100 percent white. I don't think that we have ever taken that position. What we are suggesting is that the way the money has been distributed in the past and is being distributed under existing rules is basically unfair.

Chairman NEAL. We understand that because that is the question. But it seems to me that we know a little bit more about—sure we know where it comes from originally, but what we don't know is who owns it. And the question of what category of people own it is what I am talking about.

Obviously, I don't know who owns it, but we also don't know the category. If the category is financial institutions, that seems to me points us in one direction. If the category is a bunch of small stockholders floating around all over the United States, that points us in a different direction. Yes.

Mr. HOFFMAN. Steve Hoffman, the deputy director of Governor Cuomo's office here in Washington, DC. I would contend, even if there were instances where there were individual customers out there who had not gotten the dividend, that would be all the more reason to escheat the funds to the State where the broker is located. As it was pointed out, if this customer determined that he or she had not gotten his or her dividends, he would not call up the chief executive office of the company that issued the stock, he or she would go to the brokerage because that is where he had the relation.

From a customer's point of view, that is more equitable, even if there were such a group out there.

Chairman NEAL. These hearings take a little bit of an interesting turn. Even if you escheat that, the person most likely bought the securities through a brokerage office in his or her hometown, not in the headquarters of the brokerage office in New York but in wherever, so even following your own logic, that might lead you back down to the local community somewhere.

Mr. HOFFMAN. I think those transactions would be handled within the brokerage. If someone goes to their local brokerage, funds would be escheated through headquarters, but it would float back down through a regional office.

Chairman NEAL. There again, these still are open questions.

Mr. TREMAINE. Mr. Chairman, I think if you do take the position that there are some of these types of transactions or claims that arise for the individual, the enactment of this proposed legislation would make it very difficult for the individual to assert that claim then.

They would have to then know where the principal executive office of IBM was 2 years ago when the dividend was paid, and I would venture to say that that is a burden that we shouldn't put on the individual investor.

Chairman NEAL. Excuse me one second. I am not following this point. The individual who is owed funds would go to his or her—I guess you could do it either way—securities firm's headquarters or broker.

Mr. TREMAINE. If they went to the broker and the answer was that they had been escheated, it would be up to the industry to determine where in fact they had been escheated to.

And in the case of IBM, they would have to know where IBM's principal executive office was 2 years ago if in fact that was the time period in question.

Chairman NEAL. Well, I want to thank you all very much for helping us with this. I am not sure I feel entirely comfortable with the answer yet, but we will keep working on it.

Thanks a lot. The subcommittee stands adjourned.

[Whereupon, at 3:56 p.m., the hearing was adjourned.]

APPENDIX

March 22, 1994

STATEMENT OF CHAIRMAN STEPHEN NEAL

Subcommittee on Financial Institutions Supervision, Regulation, and Deposit Insurance
House Banking, Finance, and Urban Affairs

March 22, 1994

Today, the Subcommittee examines H.R. 2443, the Equitable Escheatment Act of 1993.

We have a number of distinguished witnesses before us and have a lot to cover today. Therefore, I am limiting the opening statements to myself and the Ranking Minority Member so that we can quickly move on to our witnesses and have ample time for discussion. I will try to keep my opening remarks brief.

The bill before us, H.R. 2443, addresses the situation that develops when banks and other financial intermediaries are unable to distribute dividends, interest and other securities distributions which they hold as record owner because they cannot determine the identity of the actual, or beneficial, owner. Such intermediaries retain custody of such distributions until, after a period specified by state law, they becomes escheatable to the state. The issue before us is which state should receive these distributions.

The inability to distribute interest and dividend payments occurs only in about 0.02

percent of all distributions. But, because of the size of the securities industry, it has been estimated that this amounts to approximately $100 - $150 million a year. Currently, New York, Delaware and Massachusetts, which have large intermediaries incorporated in their states, recover almost all of such unclaimed funds. As I understand it, New York alone has received approximately $1 billion in unclaimed securities distributions since 1972.

This issue was recently before the Supreme Court. In its opinion of last spring - *Delaware v. New York* - the Supreme Court ruled that prior precedent required such owner-unknown interest and dividends held by banks and other financial intermediaries **to escheat to the state of incorporation of the financial intermediary holding the funds.**

However, in its opinion, the Supreme Court invited the states to seek action by Congress if they wished to change this distribution rule. H.R. 2443 is the result of this invitation.

This legislation distributes owner-unknown dividends and interest payments on securities held by a bank or other financial intermediary **to the state in which the issuer of such**

securities, whether corporate or municipal, maintains its principal executive office, thereby returning unclaimed funds to the jurisdiction in which the issuer actually ran its business and generated the funds. This rule of escheatment would divide the $100 - $150 million of escheatable funds estimated per year among all 50 states and the District of Columbia.

This bill would also apply to the funds in controversy in the *Delaware v. New York* case, requiring such funds - roughly $1 billion since 1972 - to be escheated to the state of the issuers' principal executive office. Sponsors of this bill estimate that this reallocation would distribute approximately $200-$250 million to New York, $11 million to Delaware, $12 to Massachusetts, and $725 to $775 million to the remaining states and the District of Columbia.

H.R. 2443 currently has 326 co-sponsors, including 22 of the Financial Institutions Subcommittee's 30 Members and 39 of the 51 Members of the Full Committee. On the Senate side, Senator Hutchison has introduced similar legislation, S. 1715, which now has 77 co-sponsors. H.R. 2443 is supported by 47 states and the District of Columbia.

This bill has engendered much contentious debate, and strong opinions have been presented on each side. There is also much confusion as to the facts surrounding this very technical issue.

The Subcommittee is holding this hearing to get all of these facts out on the table so that we may make an informed and careful decision on this legislation, and make any necessary modifications to the bill in order to ensure that the bill is fair. To this end, I have worked with Members on both sides of the issue to structure this hearing to be as fair as possible to both sides.

Let me just also state that I am troubled by the fact that so many owner unknown securities distributions are being escheated in the first place. I do not understand how very sophisticated financial intermediaries lose track of the owners of millions of dollars each year. It is my hope that this hearing will shed some light on this particular issue so that in the end, we can correct this situation and give such funds back to the persons entitled to the distribution.

I understand that this issue is still in litigation. I request that both the Members of the Subcommittee as well as the witnesses keep to the subject at hand, namely the issue of unclaimed securities distributions in general and the pros and cons of H.R. 2443, and not spend time on the specific actions of the litigants involved with this case.

As I said before, we have a number of very distinguished witnesses today, and after we hear from Mr. [ranking minority member] we will begin with Representative Chuck Schumer of New York, a member of this Subcommittee, and Senator Kay Bailey Hutchinson of Texas.

OPENING STATEMENT OF JOHN J. LaFALCE
Before Subcommittee on Financial Institutions

HEARING ON EQUITABLE ESCHEATMENT ACT OF 1993
March 22, 1994

The escheatment issue is a technical and complex one. It is this very complexity that has allowed misinformation to be spread among the 47 states that would supposedly benefit from the legislation introduced by Mr. Gonzalez last year (H.R. 2443).

Legal counsel for many states supporting this legislation have been active in trying to convince those states that the passage of the Gonzalez legislation would bring them windfall profits. Whereas it is understandable that many states would like to believe what they are hearing from their legal counsel, the reality may turn out to be quite far from the wild claims of windfall profits that are being circulated.

The legislation introduced by Chairman Gonzalez (H.R. 2443) seeks to overturn the decision reached by the Supreme Court in Delaware v. New York in March 1993. That Supreme Court decision held that unclaimed distributions of dividends and interest, held by brokers and other financial intermediaries and owed to "unknowns," were subject to escheat **by the state where the financial intermediary holding the distribution was incorporated.**

In addition to overturning this Supreme Court decision, H.R. 2443 would overturn longstanding legal precedent. It would establish a new rule that unclaimed distributions are subject to escheat **by the state where the issuer of the underlying security has its principal executive office.** In short, each of the fifty states could claim shares of these unclaimed funds.

I want to emphasize that the claims states are making by supporting the Gonzalez legislation have already been considered and rejected by the Supreme Court.

Due to the technical nature of the escheatment rules, serious misinformation has been spread. First, the bill does not deal with the most common type of funds subject to escheatment. In the vast majority of cases, there is a last known address for the "lost" stockholder or bondholder. In those cases, the primary rule applies and those abandoned funds are escheated to the state of the customer's last-known address, thereby spreading the abandoned funds among the states.

This fact is worth repeating. In the vast majority of cases, unclaimed funds are already being distributed to the states. The SEC estimates that every year, unclaimed dividends distributed to the states under the primary rule are in the range of $10 billion.

This is in comparison with about $100 million a year in unclaimed dividends and interest handled under the secondary rule. It is the secondary rule that is the subject of the Gonzalez legislation. It applies only when the beneficial owner cannot be identified. This category comes about due to small but systemic record keeping errors in the wholesale securities business, which leads to uncollected dividends and interest payments that are actually owed to brokers, banks, and their large institutional customers.

Comparing the $10 billion in funds already distributed to the states with the $100 million a year escheated to the state of incorporation of the financial intermediary puts the issue in perspective.

Many states may end up being quite unhappily surprised when they find out how small the amounts are they have to gain from passage of this legislation. And this is before allowing for whatever litigation expenses may be involved. Many states are incorrectly assuming that they have everything to gain and nothing to lose from this legislation. That could not be further from the truth.

Claims for escheated funds would go in both directions, with New York, Delaware and Massachusetts making claims on other states, as well as other states making claims on these three. Insufficient attention has been given to the fact that this legislation would allow for such a two-way street. I say this not as a threat, but in an attempt to draw attention to the reality of the situation for those states that are the victims of an incredible campaign of misinformation.

In addition, the estimates of windfall benefits to the states is based on the incorrect assumption that the bill could be applied retroactively to recapture money lawfully escheated to New York 10 or 20 years ago. **Congress does not have the power to reach back and recapture funds lawfully acquired by a state.**

After retroactive funds have been removed from projections of windfall profits by other states, the amount of funds any state has to gain is insubstantial, and most likely consumed by the costs of complying with the legislation.

It should also be emphasized that not only is retroactive application of the bill unconstitutional, it is in many cases simply not possible. It would require all banks and securities firms across the country to reconstruct tens of thousands of financial transactions and reallocate the funds subject to escheatment under the new system established by the bill, entailing enormous costs even if feasible.

If H.R. 2443 were enacted, banks and securities firms would have no choice but to pass on to the states the enormous compliance costs. The modest returns states will receive may not even be sufficient to offset these enormous compliance costs that will ultimately be paid by them.

Finally, let me say that there should be no embarassment or shame involved in the fact that York and Delaware are benefiting from the fact that many banks and securities firms are located within their borders. It is as legitimate as other states benefiting from the industries that tend to be concentrated in those states - examples being the oil and gas industry, the automobile industry, and the aerospace industry.

If this bill is legitimate, why not require a nationwide redistribution of severance taxes collected in the oil-patch states over the last three decades?

Congress should not be in the business of redistributing lawfully collected revenues from one state to another. This legislation is misguided and based on serious misinformation.

OPENING STATEMENT OF MAXINE WATERS
Hearing on H.R. 2443
The Equitable Escheatment Act

Mr. Chairman, I am extremely pleased you have called this hearing today. I have worked hard to see that this subcommittee consider H.R. 2443 is the most expeditious manner. This hearing is an important start.

Escheatment is an issue which has generated enormous interest around the country, in the Congress, and in the Banking Committee.

While much of the discussion of H.R. 2443 involves extremely detailed accounting principles and arcane applications of securities laws, the fundamental issue is one of fairness. That is why H.R. 2443, which seeks to correct current law, has over 320 cosponsors in the House, and the companion legislation, introduced by Sen. Hutchison, has 77 cosponsors in the Senate. It is why I, along with Representative Leach, was able to get 32 signatures of House Banking Committee members requesting this hearing.

Without arguing the fine points of this legislation, I would suggest that timing is very important. Current practice has been going on for 24 years. Over $1 billion in unclaimed securities are at stake.

The Supreme Court in its ruling on Delaware v. New York made clear that it is up to Congress to codify a distribution rule different from the current practice. I sincerely hope that after today's deliberation this subcommittee will see fit to move quickly to mark up H.R. 2443. Thank you.

March 22, 1994

OPENING STATEMENT OF CONGRESSMAN MICHAEL N. CASTLE

* MR. CHAIRMAN, AS A MEMBER OF THE FULL BANKING COMMITTEE I WANT TO THANK YOU FOR ALLOWING ME TO PARTICIPATE IN THIS SUBCOMMITTEE HEARING ON H.R. 2443. THIS IS THE BIGGEST FEDERAL-STATE ISSUE FACING DELAWARE TODAY.

* I STRONGLY OPPOSE THIS LEGISLATION FOR A NUMBER OF REASONS, NOT THE LEAST OF WHICH IS THAT THIS ISSUE CAN MORE QUICKLY AND FAIRLY BE RESOLVED THROUGH THE ON-GOING NEGOTIATION PROCESS.

* PLEASE ALLOW ME TO BRIEFLY PROVIDE A LITTLE HISTORY AND CONTEXT TO THIS ISSUE.

* DELAWARE VERSUS NEW YORK IS A U.S. SUPREME COURT CASE THAT ORIGINATED DURING MY FIRST TERM AS GOVERNOR IN 1988.

  - An employee in the State Department of Finance had brought to our attention that New York had been collecting tens of millions of dollars that belonged to Delaware, under existing commercial law precedent.

  - The money involved comes from **unclaimed** stock dividends and bank accounts collected by New York since 1972 from brokerage companies.

* AFTER A LONG, SOMETIMES BUMPY LEGAL RIDE, THAT EVENTUALLY INCLUDED EVERY STATE IN THIS COUNTRY... IN MARCH, 1993, THE U.S. SUPREME COURT UPHELD ITS LONG HISTORY OF LEGAL PRECEDENTS CONCERNING THE STATE OF INCORPORATION OF THE HOLDER OF UNCLAIMED DIVIDENDS, AND RULED IN DELAWARE'S FAVOR.

* IN JANUARY OF THIS YEAR, UNDER GOVERNOR CARPER'S LEADERSHIP AND DILIGENT EFFORTS, DELAWARE AND NEW YORK FINALLY AGREED TO A FINANCIAL SETTLEMENT.

* **I WANT TO STRESS THAT NEGOTIATIONS ARE CURRENTLY ON-GOING TO SETTLE THIS CASE WITH THE OTHER STATES.**

* **H.R. 2443 APPEARS TO BE ATTRACTIVE LEGISLATION; HOWEVER, IT WOULD NOT BE THE BIG MONEY-MAKER THAT SOME ARE PROMISING -- AND IS A MATTER BETTER LEFT TO OUR STATES TO RESOLVE WITHOUT CONGRESSIONAL ACTION.**

* **ESCHEATMENT IS ONE OF THE MOST COMPLEX AREAS OF THE LAW. HOWEVER, I BELIEVE THE INFORMATION AND CHARTS PRESENTED BY GOVERNOR CARPER AND OTHERS WILL HELP SIMPLIFY AND EXPLAIN THE ISSUE.**

* **AND I THINK IT'S VERY IMPORTANT TO KEEP IN MIND WHO AND WHAT INITIATED AND IS DRIVING THIS LEGISLATION.**

  - **THE ATTORNEY REPRESENTING MOST OF THE INTERVENING STATES, BERNIE NASH, HAS A $25 MILLION CONTINGENCY FEE BASED ON THE LITIGATION.**

- **HE OBVIOUSLY IS EAGER TO GET PAID, AND HAS ADMITTED TO INITIATING THIS LEGISLATION AS A BARGAINING CHIP TO FUEL SETTLEMENT TALKS OVER THE LITIGATION.**

- **AS A MATTER OF FACT, BERNIE NASH STANDS TO GAIN MORE MONEY IN THIS CASE THAN ROUGHLY THREE-QUARTERS OF THE STATES.**

- **THAT'S RIGHT...34-TO-35 STATES WILL RECEIVE FAR LESS MONEY UNDER THE LEGISLATION THAN MR. NASH HAS AT STAKE, INCLUDING THE STATES OF NORTH CAROLINA, IOWA, IDAHO, MARYLAND, MINNESOTA, UTAH AND WISCONSIN.**

* IT IS CRITICAL TO UNDERSTAND THAT THE U.S. SUPREME COURT'S RULING IN NO WAY AFFECTS EVERY STATE'S RIGHT TO ESCHEAT <u>THE VAST MAJORITY OF</u> ABANDONED, UNCLAIMED SECURITIES.

* NOR IS THE MONEY AT ISSUE FUNDS THAT BELONG TO INDIVIDUALS -- <u>INSTEAD, THIS SMALL PERCENTAGE OF UNCLAIMED SECURITIES ARE FUNDS OWED BY FINANCIAL INSTITUTIONS TO OTHER FINANCIAL INSTITUTIONS</u>, WHICH HAPPEN TO BE INCORPORATED IN FINANCIAL CENTER STATES, INCLUDING DELAWARE, NEW YORK, MASSACHUSETTS.

* AND I HOPE THIS HEARING DISPELS THE MYTH THAT UNDER THE WELL-FOUNDED CURRENT LAW, DELAWARE OR NEW YORK OR MASSACHUSETTS IS ROBBING MONEY FROM YOUR STATE OR SOME ELDERLY CITIZEN IN YOUR STATE.

    - THAT IS <u>NOT</u> THE CASE. THE BROKERAGE COMPANIES HAVE ALREADY PAID THE INDIVIDUALS. IT IS THE BROKERAGE COMPANIES OR OTHER FINANCIAL INSTITUTIONS THAT ARE OWED THE MONEY.

    - AND, AGAIN, THIS IN NO WAY AFFECTS ANY STATE'S RIGHT TO CONTINUE TO ESCHEAT THE VAST MAJORITY OF UNCLAIMED FUNDS THAT BELONG TO YOUR STATE.

* I URGE YOU TO KEEP AN OPEN MIND AS YOU LISTEN TO THE TESTIMONY OF GOVERNOR CARPER AND OTHERS TODAY, AND ALLOW OUR STATES TO CONTINUE TO WORK ON RESOLVING THIS ISSUE -- WITHOUT THIS UNWISE LEGISLATION.

THANK YOU.

MICHAEL N CASTLE
DELAWARE AT-LARGE

COMMITTEES
BANKING, FINANCE AND URBAN AFFAIRS
MERCHANT MARINE AND FISHERIES
EDUCATION AND LABOR

Congress of the United States
House of Representatives
Washington, DC 20515-0801

1205 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON DC 20515-0801
(202) 225-4165

DISTRICT OFFICES
THREE CHRISTINA CENTRE
SUITE 107
201 N WALNUT STREET
WILMINGTON DE 19801
(302) 428-1902

J ALLEN FREAR FEDERAL BUILDING
300 S NEW STREET
DOVER, DE 19901
(302) 736-1666 (KENT)
(302) 856-3334 (SUSSEX)

March 22, 1994

Dear Banking Committee Colleague:

I want to share my views on H.R. 2443, the Equitable Escheatment Act. This legislation would unconstitutionally and unfairly usurp States' rights, overturn three decades of U.S. Supreme Court precedents and create disturbing and unnecessary congressional interference in an issue currently being resolved among the States.

At issue in the legislation are States rights' to unclaimed dividends and interest held by brokers and other financial intermediaries and owed to unknown beneficial owners. The bill would overturn the March 1993 Supreme Court ruling in Delaware v. New York, which involved all fifty states, and reaffirmed three decades of legal precedents that such funds escheat to the state of incorporation of the holder, which are the brokers in this case.

If H.R. 2443 is enacted, it would not only apply to future unclaimed distributions, but also **retroactively** to any unclaimed distribution properly escheated to any state at any time in the past, which raises serious constitutional issues involving federal encroachment on state sovereignty.

More importantly, the States are actively participating in further Court proceedings among themselves as to the amount of money each state is entitled to receive in accordance with the Supreme Court's ruling. These proceedings are before a Special Master appointed by the Court. Last June, lead counsel for 31 of the States told the Special Master that his clients and States similarly situated could collect more than 90% of the funds at issue in the case, through the ongoing litigation process.

The states of Delaware and New York want to work-out a settlement with the other intervening states. Congress should let the States resolve this issue through negotiation.

Finally, the bill would create an administrative nightmare for the securities and banking industries, with almost no fiscal benefit to any given State in return. Because of the enormous expenses and overburdensome administrative and compliance costs involved, the Securities Industry Association and the American Banking Association opposed this very proposal in the Supreme Court.

This legislation would create many more problems than it would solve. It would pit state against state on an issue which can be resolved through negotiations among the states. If enacted, it would launch a war of lawsuits on both administrative and constitutional grounds. I urge you to carefully evaluate all the potential consequences of this unwise legislation.

Sincerely,

Mike Castle

Michael N. Castle

MAURICE D. HINCHEY
26TH DISTRICT, NEW YORK

COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS

SUBCOMMITTEES
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COMMITTEE ON NATURAL RESOURCES

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NATIONAL PARKS AND PUBLIC LANDS
GENERAL OVERSIGHT

Congress of the United States
House of Representatives
Washington, DC 20515-3226

WASHINGTON OFFICE
1313 LONGWORTH BUILDING
WASHINGTON, DC 20515
(202) 225-6335

KINGSTON OFFICE
291 WALL STREET
KINGSTON, NY 12401
(914) 331-4466

BINGHAMTON OFFICE
100A FEDERAL BUILDING
BINGHAMTON, NY 13901
(607) 773-2768

ITHACA OFFICE
CARRIAGE HOUSE-TERRACE HILL
ITHACA, NY 14850
(607) 273-1388

Statement of Congressman Maurice D. Hinchey

Before the House Subcommittee on Financial Institutions Supervision, Regulation and Deposit Insurance

March 22, 1994

Mr. Chairman, thank you for holding this hearing today on HR 2443, the Equitable Escheatment Act of 1993. While I have concerns about this legislation, I am pleased that this public forum is being provided to receive testimony from both sides of the issue. We are honored to have such a distinguished panel of witnesses, and I want to extend a special welcome to my former colleague from the State Legislature, Mr. Oliver Koppell.

Mr. Chairman, I believe that the bill that is being discussed today is misnamed. A more appropriate title would be the Inequitable Escheatment Act of 1993, or the Retroactive Financial Undermining of New York Act of 1993. This legislation would not only bring financial disaster for New York, it sets a bad precedent for congressional intervention in matters that should be settled within the courts. Congress has no legitimate role in a financial dispute that is purely between the states, especially a dispute that has already been in the highest court of our nation.

There are several aspects of this bill that raise constitutional concerns. Most importantly, the bill would modify existing law retroactively back as far as the 1960's. The Supreme Court has interpreted the law to say that states where the financial intermediaries are incorporated are entitled to unclaimed dividends. The Court has spoken, and the dispute between New York and Delaware has been settled. To change the law retroactively is wrong, and likely violates our Constitution.

Outside of the Constitutional concerns, HR 2443 would undermine the financial condition of New York by mandating payments totalling hundreds of millions of dollars. Having spent 18 years as a Member of the State Assembly, I can tell you for a fact that there is no pot of money that is sitting in Albany waiting for other states to make their claim on it. The funds to which other states are trying to make a claim on have been spent rebuilding our roads, providing financial security for the less fortunate, and serving a variety of other public purposes. While there is a lack of accurate figures for the financial impact this legislation has for each individual state, most who support HR 2443 do not realize that this change is a two-way street, and may result in substantial losses for their state treasury. The numbers that have been floated around by the supporters of HR 2443 have been grossly inflated, and do not incorporate the potential prospective losses to each state. Net gains for most states are minimal, while New York stands to lose hundreds of millions of dollars that have already been spent. The legislation would also create an administrative nightmare for the financial industry. The securities industry flatly opposes this legislation based on the new accounting procedures that would be required to keep track of escheated funds in this manner. 51 separate reports would be required for owner-unknown escheatments in 51 separate formats in order to keep track of the headquarters of corporations at the time that stock was issued.

I find it ironic that Members of this Committee from California and Texas are some of the most active advocates of this legislation. Within the last six months, I have voted to provide $18 billion for the savings and loan cleanup and almost $10 billion to help the victims of the L.A. earthquake. While my state had little to gain from the funding, I did not hesitate to support these measures because it was the right thing to do for the victims of these disasters. Now, my colleagues from Texas and California seek to gain hundreds of millions of dollars more at the expense of the people in my state by supporting an unfair and potentially unconstitutional bill. I also find it troubling that many of my colleagues who raised constitutional questions about retroactivity when we passed the President's deficit reduction law last year -- a law retroactive by six months and enacted before taxpayers were required to file -- are now among the biggest supporters of this bill.

Mr. Chairman, this is an issue that should be settled by the states, not Congress. The Supreme Court has ruled, and Congress does not have a role in this dispute. I oppose this legislation, and am hopeful that today's hearing will bring to light why we should not move this legislation forward. Thank you.

House

Opening Statement of
Representative Spencer T. Bachus, III
before the ~~Housing~~ Committee on Banking, Finance and Urban Affairs,
Subcommittee on Financial Institutions Supervision,
Regulation and Deposit Insurance

<u>Hearing on H.R. 2443, the Equitable Escheatment Act</u>

Thank you, Mr. Chairman, for the opportunity to address the subcommittee and for your leadership in conducting this hearing.

Mr. Chairman, I would like to reiterate my firm support for H.R. 2443, the Equitable Escheatment Act, which will allow my state of Alabama and 46 other states to receive their fair share of unclaimed distributions. It is my hope that this subcommittee will move expeditiously to report this bill to the full Banking Committee, thus enabling consideration by the full House in the near future.

H.R. 2443 will ensure that dividend and interest payments paid by taxpayers and companies in all States are returned to all States. Not only is this equitable, but it is entirely consistent with what Congress did in 1974, when it overturned a Supreme Court decision that awarded unclaimed money order funds to one State. Like H.R. 2443, the money order statute returned funds to the States where they originated. That is the precedent to which this Committee should adhere.

Mr. Chairman, this legislation enjoys the support of 323 of our colleagues. I urge prompt consideration of H.R. 2443 and I look forward to hearing today's testimony. Thank you again, Mr. Chairman, for holding this hearing.

TESTIMONY OF
CONGRESSMAN CHARLES E. SCHUMER
BEFORE THE
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS SUPERVISION, REGULATION AND DEPOSIT INSURANCE
COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS
H.R. 2443, THE "EQUITABLE ESCHEATMENT ACT OF 1993"

March 22, 1994

Thank you, Chairman Neal. I have asked for this opportunity to address the Subcommittee because I am gravely concerned that my colleagues are being misled about H.R. 2443. While this bill may look like the goose that laid the golden egg, the promises that this bill makes are just fairy tales. And we all know that fairy tales don't come true. I welcome this opportunity to set the record straight and to separate escheatment fact from fiction.

Proponents of the so-called "Equitable" Escheatment Act have circulated wildly inflated projections of each state's potential gain. They've said that the states other than New York, Delaware and Massachusetts will get a windfall: millions of dollars, tens of millions of dollars in many cases. They've promised you not only the proverbial free lunch, but a virtual banquet, with all expenses paid by New York, Delaware and Massachusetts.

These inflated projections may have conjured up visions of sugar plums dancing in your heads. Don't kid yourselves; you'll never see that money. The massive gains projected by the bill's proponents are based on the false premise that the bill will be applied retroactively -- that funds escheated to New York 10, 15, 20 or more years ago will be redistributed.

No court anywhere in America would allow such a retroactive taking. This would constitute nothing less than confiscation. New York lawfully and properly collected these funds under the rules of escheatment in effect at the time and which had been in effect for many years. Those very same escheatment rules were re-affirmed by the Supreme Court last year when it decided the Delaware v. New York case.

Sure, New York benefits from the fact that the financial services industry is concentrated in New York, just like California benefits from its entertainment industry, just like Texas benefits from its oil and gas industry. Each state has its own local industry contributing to its economy. But there's nothing wrong or inequitable about that.

What this bill sets out to do makes about as much sense as a bill requiring California to send all the taxes that it receives on movie industry revenues to New York because that's where the investment banks are that provide the financing that makes the movie business possible.

Judge Gibbons will explain in his testimony this morning that the retroactive application of H.R. 2443 will never withstand a court challenge. And I can assure you there will be a court challenge. So, if you think that what this country needs, what the taxpayers in Texas, New York, North Carolina, Iowa and all the 50 states need is more litigation over a confiscatory piece of legislation and more fees for lawyers . . . then H.R. 2443 is for you.

And, if you believe that Congress ought to divert its time and energies to intervene in a lawsuit that has been fully litigated, which pits state against state and which does not involve one red cent of federal money, this bill also is for you. But if that doesn't make sense to you, I urge you to take a hard look at the facts and separate them from the myths and sugarplum fantasies that have propelled this bill forward.

Let's clear up the big myth about this bill right here and now. There is no free lunch, no windfall, no sugarplum feast. At most, your states will collect a few crumbs from prospective application of this bill. Half the states would get -- on a gross basis, before costs are taken into account -- less than one million dollars a year. Three-fifths of the states would get -- also on a gross basis, before costs -- less than two million dollars a year.

These gross figures are based on what states would take from New York, Delaware and Massachusetts each year. In reality, H.R. 2443, creates its own set of costs that will have to be absorbed by the states. It's a two-way street. Owner-unknown funds that your state currently escheats from your banks, brokers and other financial institutions will have to be given up under H.R. 2443. These amounts have to be deducted from whatever amount your state hopes to receive under H.R. 2443. That's right, your state could even lose money under this bill.

States with large bank headquarters, California, Texas, Illinois and yes Mr. Chairman, even North Carolina could lose money particularly when the retroactivity provision is knocked out.

States' future profits from H.R. 2443 will be sharply reduced, and in some cases could be wiped out entirely, by the costs incurred by the financial institutions that will have to bear the tremendous compliance burden created by H.R. 2443. Others today will talk in more detail about the huge compliance problems and costs of this bill. Suffice it for me to say that those huge costs will inevitably be passed on to the states who are the supposed beneficiaries of this bill, whittling down their profits even further.

The real winner here, in this modern day war between the states, are the attorneys of a large Washington, D.C. law firm who have mounted a full-court lobbying effort on this bill on a contingency fee basis. They are now using Congress as a tool to line their own pockets. These contingency fee lawyers have promised you the pot of gold at the end of the rainbow to pressure New York and Delaware into paying large sums in settlement of a claim which the Supreme Court rejected in its entirety. These are the same lawyers who lost their case for the 47 states in the Supreme Court. Now, they are trying to collect their contingency fee by steamrolling this piece of bad law through Congress.

And it is a lot of money.

According to New York's state office, if H.R. 2443 passes as is, one law firm would get $16 million. The law firm of Dickstein and Shapiro would do better than half the states in America.

This kind of contingency fee lobbying before state legislatures is illegal in 32 states -- including Iowa, North Carolina, Minnesota and California -- and it should be illegal. Yet, these same states have allied themselves with contingency fee lawyers to push this bill, even though this activity would be prohibited in their own state capitals. In fact, Governor Ann Richards, who is here today to testify on behalf of H.R. 2443, personally signed into law the Texas prohibition on contingency fee lobbying.

I think these 32 states have a good law. This morning I introduced legislation to do what 32 states have already done and prohibit contingency fee lobbying in Congress. Moreover, my bills prevent the collection of lobbying contingency fees retroactively -- that's right, retroactively. If this House of Congress can move an escheatment bill that reaches back to apply retroactively, it can also move a bill making contingency fee lobbying illegal retroactively.

It is outrageous, chilling, and undemocratic that a lobbyist can make $16 million on a contingency basis in exchange for Congress passing legislation. The more this law firm deceives, the more it earns. We cannot allow them to get rich and us to get taken. You can be absolutely certain that I will attach my retroactive lobbying contingency bill as an amendment to HR 2443. Whatever happens to this ill-conceived legislation, Mr. Nash, your law firm is not getting a contingency out of Congress.

Mr. Nash, you may have done one great service with this bill. We may be able to put an end to the bottom feeding practice where lawyers and lobbyists actually gain millions because they successfully twist the legislative process. It's a disgrace and whatever the outcome, it should stop now. This "gun-for-hire" mentality should not come within 30 miles of Congress.

In closing, let me exhort my colleagues: Don't believe the exaggerated claims of windfall profits to your state concocted by the contingency fee lawyers who are promoting this bill. Look behind the inflated numbers, ask the questions -- are these projections real? Is this bill fair?

Ask yourself: Does confiscatory legislation make sense? Would it make sense if the roles were reversed, if all the 49 states had ganged up against <u>your</u> state and made a private pact to retroactively divide among themselves the revenue generated by <u>your</u> state's main industry, to use Congress as a tool to achieve this goal, and to fund it all through a contingency fee arrangement that would be illegal in their own state capitals?

Mr. Chairman, thank you for this opportunity to testify about a matter about which I feel so strongly. This is a bad bill.

STATEMENT OF UNITED STATES SENATOR KAY BAILEY HUTCHISON

H.R. 2443
THE EQUITABLE ESCHEATMENT ACT

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS
COMMITTEE ON BANKING, FINANCE, AND URBAN AFFAIRS
HOUSE OF REPRESENTATIVES

March 22, 1994

Mr. Chairman, thank you very much for giving me the opportunity to be here today. I am here both as the Senate sponsor of the Equitable Escheatment Act, representing myself, Senator Boxer of California, and 77 other co-sponsors, and as a former Treasurer of the State of Texas. As you know, Governor Richards is also a former Treasurer of Texas -- obviously this bill is important to Texas if both of us are here today together to support it.

The Equitable Escheatment Act will restore fairness to the laws governing claims by states to <u>one kind</u> of abandoned property. It only applies to securities distributions, such as corporate dividends and interest paid on municipal bonds, where the owner of the distribution is not known -- so called "owner-unknown unclaimed distributions." It will return the payments to the states of their origin rather than to the two or three states where the financial intermediaries that hold them for their beneficial owners are incorporated.

The bill does not affect the escheatment of an "owner-<u>known</u>" securities distribution. That is the classic no-forwarding-address situation. "Owner-known" distributions are escheated <u>to all states</u> based on the last known address of the beneficial owner under current law.

The owners of the distributions are not known because dividends and interest on publicly traded securities are paid to the record owners that hold the property for the beneficial owners -- the stock or bonds are held in "street name." Billions of stocks and bonds held in street name are traded and pay dividends each year. Financial intermediaries receive large dividends and interest payments from issuers, but often can't allocate money to the beneficial owner because of an error, the security traded on or near the record date, the stock split, or a merger occurred. Only two-hundredths of one percent of all distributions remain unclaimed, but the total dollar amount of "owner-unknown" distributions at stake has ranged from $100-$150 million annually.

Under the escheatment doctrine, the State of New York has been seizing "owner-unknown" distributions. The bill would require "owner-unknown" interest paid on a municipal bond to be returned to the state of issuance. Similarly, "owner-unknown" dividends and interest paid by corporations would be returned to the state of the principal executive office of the paying corporation. All "owner-unknown" distributions should escheat to the state of closest relationship, following the principal set by the present distribution of "owner-known" dividends and interest.

To put it simply, money from Texas or Illinois citizens paid as interest on Texas or Illinois municipal bonds should be returned to Texas or Illinois if the rightful owners are not known. Dividends earned by the success of companies based in Massachusetts should also be returned to Massachusetts.

Fairness dictates that unclaimed funds should return to all the States from which they originated, not to two or three states that happen to be the States of business or incorporation of intermediaries. The unjust rule permitting this money to go to New York or Delaware cannot stand.

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TESTIMONY OF
ANN W. RICHARDS
GOVERNOR OF TEXAS

on

HR 2443, THE EQUITABLE ESCHEATMENT ACT

presented to the

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS, SUPERVISION
REGULATION AND DEPOSIT INSURANCE

UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 22, 1994

Remarks of
Governor Ann W. Richards
to the House Financial Institutions Subcommittee
of the House Banking Finance and Urban Affairs Committee
on H.R. 2443, The Equitable Escheatment Act
March 22, 1994

Note to the reader: Governor Richards frequently deviates from her prepared remarks.

Good Morning , Mr. Chairman, members of the committee. I appreciate this opportunity to testify on H.R. 2443, the Equitable Escheatment Act. This Act concerns an issue of great importance, not only to the state of Texas, but to all of the other states and the District of Columbia.

As you know, this legislation deals with the question of which state is entitled to leftover dividend and interest payments on securities when the brokerage firms or banks holding the funds have been unable to determine their rightful owner. This is no small amount, but has added up to almost a billion dollars over the last twenty years. Because most of the brokers, that is the securities firms, are located in New York, the state of New York has kept these funds. Brokers and securities firms have held onto these funds, and then, when required, turned them over, or escheated them, to New York. These funds have been deposited in the general revenue fund and spent by the state government.

Governor Carper's state of Delaware first recognized the inequity of this practice and sued New York. In that litigation, Delaware argued that, as the state of incorporation for the brokers holding the funds, Delaware was entitled to a share of the money. Delaware realized early in the game that the retention of these funds by New York was wrong.

Despite the litigation, New York continued to collect these funds and spend them as if they were general revenue. Only when the Supreme Court forced New York to give up a large portion of these funds, did New York agree to settle with Delaware. Now that Delaware stands to gain $200 million, Delaware has sided with New York in an attempt to deny all the other states their rightful share of these funds.

I had sincerely hoped that by now the states would be able to reach a settlement among themselves. But the negotiations have gone nowhere. Congress introduced legislation to compel New York and Delaware to share fairly with all the states.

Escheat goes back centuries to English feudal law. This law recognizes that no one person should benefit from property that belongs to someone else. In Texas, we try constantly to find the true owner of the property. If the property is not claimed, it is used by the state to benefit the public. In this way, taxpayers of every state benefit from a fair distribution of unclaimed property.

This legislation would return the unclaimed dividends and interest to the state of the principal executive office of the issuer of the security. For example, dividend payments from a publicly-traded company headquartered in Dallas would be returned to Texas. New York and Delaware would receive monies from securities issued by companies headquartered in their states. This is fair.

In the past, New York has kept the unclaimed dividends paid by American Airlines, Hughes Tool, EDS, and Mesa Petroleum. Without the legislation, Delaware would claim these funds because those companies filed some paperwork to incorporate there. This doesn't make any sense. No one would accuse Boone Pickens and Mesa Petroleum of being from Delaware.

The legislation does not affect any type of property except securities. So, if oil royalties paid by a producer of an oil well located in Texas and owned by a citizen of Delaware are unclaimed, the royalties would be sent to Delaware as the state of the last known address of the missing owner.

Let's consider a revenue bond issued by the City of Houston. This bond is paid by taxpayers in Houston. Currently, unclaimed distributions on this bond are kept by New York state. The Houston City Council could have a difficult time convincing their taxpayers to support a revenue bond if the taxpayers knew that some of benefit of their tax dollars was paving the potholes of the streets of New York.

Under this legislation, these unclaimed payments would be returned to the state of Texas. Texas could recover approximately $60 million of unclaimed distributions issued by local governments and companies with a true headquarters in Texas as a result of the passage of the legislation. There is no reason why Texas bond money should be used to balance the budgets in New York and Delaware.

The Treasurer of Texas, Martha Whitehead, has analyzed the amount of dividend and interest payments presently returned to our state. She has determined that Texas received $354,000 of owner-unknown securities payments in 1993. This is a far cry from the projected $5-10 million annual share that Texas expects to recover under a fair system. But, even if our share were meager, it would still be our share.

The legislation does not burden banks or securities firms. The law currently requires them to comply with the unclaimed property laws of 50 states where the owner is known. This bill simply requires those firms to do the same thing with a small percentage of payments in which the owner is not known. These firms are well paid for this work because they get the float on this money for three to five years before turning it over to any of the fifty states.

Texas and the other forty-six states who are working for this legislation are not attacking New York and Delaware for being centers for financial services industries. Brokers in New York currently return owner-known funds to the state of the last known address of the owner of the property.

This legislation simply returns funds to the first owner, the issuer of the security, when the owner is unknown. Rather than giving the funds to the holder of the money, this legislation returns the funds to the states where the commercial activity produced the dividend and eases the harshness of the "winner take all" position argued by New York and Delaware.

New York complains that the legislation is unfair because it returns to other states money they already collected and spent. Spending it did not make it theirs.

It is important to remember that we are not talking about a allocation of federal monies between the states. We are talking about a redistribution of property of citizens of every state.

In this time of budget constraints, as a Governor, I look for every source of income. Approximately half of the amounts collected under our state's unclaimed property laws will be deposited in the foundation school fund to directly benefit the children of Texas. If Congress will act, the money that New York and Delaware enjoy will not come at the expense of schoolchildren in Texas.

I am grateful to Chairman Gonzalez and to Mr. Leach for their bi-partisan leadership on this issue. I hope that the subcommittee will act promptly on this legislation so that the 322 co-sponsors in the House and the 77 co-sponsors in the Senate will soon have the opportunity to vote on this important legislation.

Thank you for the opportunity to express my unqualified support for the Equitable Escheatment Act.

STATE OF TEXAS
STATE OF SOUTH CAROLINA

February 4, 1994

Honorable Thomas S Foley
Speaker of the House of Representatives
Washington, D.C. 20515

Honorable George J Mitchell
Majority Leader of the Senate
Washington, D C 20510

Dear Speaker Foley and Majority Leader Mitchell:

As Governors of our respective States, we write to express our strong support for H.R. 2443 and S. 1715 (the Equitable Escheatment Act) and to request your assistance in guiding the legislation through the Congress within the next 30 days. This legislation is important to our States because it allocates non-tax revenue fairly among all States and does not place extra burdens on the taxpayers of our States

Failure to expeditiously enact this legislation would jeopardize the fair distribution of $1 billion in dividends and interest that originated in all States, and potentially permit only three States (Delaware, New York and Massachusetts) to divide these funds. To allow those States to escheat interest paid by taxpayers of our States on our State and municipal bonds, and dividends paid by companies headquartered in our States, would be grossly unfair and is wholly unacceptable.

The Equitable Escheatment Act authorizes the State from which owner-unknown unclaimed dividends and interest originated to escheat such funds in accordance with State laws. Under the legislation, the $1 billion seized by New York would be fairly allocated among all the States, including New York, which would retain $200-$250 million. The legislation also would apply to the $100-$150 million of such funds which will continue to accrue annually.

H.R. 2443 and S. 1715 would overturn the inequitable decision of the Supreme Court in Delaware v. New York. In this on-going suit involving all 50 States, the Supreme Court is requiring New York to disgorge an unspecified amount of these funds. Delaware has claimed $891 million from New York; and Massachusetts is claiming $40-$50 million. Under the Supreme Court decision, the 47 other States would recover less than $2 million, or 2 cents per household.

The Court invited the States to "air their grievances before Congress" which, the Court acknowledged, could "settle this dispute" through appropriate legislation. Congressional support to expeditiously and fairly resolve this dispute has been overwhelming. H.R. 2443 has 315 co-sponsors; and S. 1715 has 74 co-sponsors.

Time is now of the essence, however. On January 21, 1994, New York settled its litigation with Delaware for $200 million (or $800 per Delaware household), with New York keeping $800 million. New York has already paid $35 million to Delaware, although neither the

STATE OF TEXAS
STATE OF SOUTH CAROLINA

Master nor the Supreme Court has approved the settlement Delaware and New York have not settled with the other 47 States. Only the certainty of swift and decisive legislative action will assure that our States are treated fairly, whether by settlement with Delaware and New York under the threat of imminent legislation or by enactment of the legislation itself.

Your leadership is essential to the fairest possible outcome which can only be achieved by moving the legislation through the House on its suspension calendar and by putting it on a fast track in the Senate

We appreciate your support and stand ready to assist you with our delegations in every way possible.

Very truly yours,

Ann W. Richards
Governor of Texas

Carroll Campbell
Governor of South Carolina

Terry E Branstad
Governor of Iowa

Governor of Connecticut

Lawton Chiles
Governor of Florida

Jim B. Hunt Jr.
Governor of

Edward T. Schafer
Governor of North Dakota

Jim Guy Tucker
Governor of Arkansas

John Engler
Governor of Michigan

Mel Carnahan
Governor of Missouri

Howard Dean
Governor of Vermont

Joan Finney
Governor of Kansas

STATE OF TEXAS
STATE OF SOUTH CAROLINA

Governor of S.D.

Governor of Kentucky

Governor of Wy.

Governor of Nebr.

Governor of Wisconsin

Governor of Colo.

Governor of Oklahoma

Governor of WEST VIRGINIA

Governor of Mississippi

Governor of Hawaii

Governor of Rhode Island.

Governor of [illegible]

Governor of Utah.

Governor of GEORGIA

Governor of Virginia

Governor of NEVADA

STATE OF TEXAS
STATE OF SOUTH CAROLINA

Barbara Roberts	Pete Wilson
Governor of OREGON	Governor of CALIFORNIA
Stephen Merrill	
Governor of New Hampshire	Governor of
Jim Edgar	Edwin Edwards
Governor of ILLINOIS	Governor of Louisiana
Cecil D. Andrus	John R. McKernan Jr.
Governor of IDAHO	Governor of Maine
[illegible]	Marc Racicot
Governor of OHIO	Governor of Montana
Ned McWherter	Arne H. Carlson
Governor of TENNESSEE	Governor of Minnesota
Evan Bayh	Bruce King
Governor of INDIANA	Governor of NEW MEXICO
William Donald Schaefer	
Governor of Maryland	

STATE OF TEXAS
STATE OF SOUTH CAROLINA

cc: Honorable Robert H. Michel, Minority Leader of the House
Honorable Robert J. Dole, Minority Leader of the Senate
Honorable Henry B. Gonzalez, Chairman,
Committee on Banking, Finance and Urban Affairs
Honorable Donald W. Riegle, Jr., Chairman,
Committee on Banking, Housing and Urban Affairs
Honorable Stephen L. Neal, Chairman,
Subcommittee on Financial Institutions Supervision, Regulation and Deposit Insurance
Honorable Christopher J. Dodd, Chairman
Subcommittee on Securities

STATE OF ALABAMA
STATE OF NEW JERSEY
STATE OF WASHINGTON

February 24, 1994

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

Honorable George J. Mitchell
Majority Leader of the Senate
Washington, D.C 20510

Dear Speaker Foley and Majority Leader Mitchell:

We are pleased to join the February 4, 1994 letter signed by 43 Governors urging Congress to enact H R. 2443 and S. 1715 (the Equitable Escheatment Act) within the next few weeks. As you may know, New York and Delaware have declined to make a substantive settlement proposal to resolve the States' dispute over unclaimed securities distributions. Notwithstanding their rigid stance -- and their failure even to respond to our past settlement proposals -- on February 16, 1994, the 47 States supporting the legislation made a substantive settlement proposal, a copy of which is attached

Until floor consideration of the legislation is scheduled, New York and Delaware have no incentive to negotiate in good faith, and will continue to ignore the equitable interests of the other States Your leadership is needed to ensure that all States are treated fairly, either through settlement or legislative enactment.

Thank you again for your support

Very truly yours,

Jim Folsom
Governor of Alabama

Christine T. Whitman
Governor of New Jersey

Mike Lowry
Governor of Washington

STATE OF ALABAMA
STATE OF NEW JERSEY
STATE OF WASHINGTON

cc Honorable Robert H. Michel, Minority Leader of the House
Honorable Robert J. Dole, Minority Leader of the Senate
Honorable Henry B. Gonzalez, Chairman,
Committee on Banking, Finance and Urban Affairs
Honorable Donald W. Riegle, Jr., Chairman,
Committee on Banking, Housing and Urban Affairs
Honorable Stephen L. Neal, Chairman,
Subcommittee on Financial Institutions Supervision, Regulation and Deposit Insurance
Honorable Christopher J. Dodd, Chairman
Subcommittee on Securities

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS

ONE HUNDRED THIRD CONGRESS

2129 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6050

February 28, 1994

Honorable Martha Whitehead
State Treasurer
LBJ State Office Building
Post Office Box 12608, Capitol Station
Austin, Texas 78711

RECEIVED
MAR 07 1994
TREASURY DEPARTMENT
EXECUTIVE ADMIN.

Dear Ms. Whitehead:

As you may know, H.R. 2443, the Equitable Escheatment Act of 1993, has been referred to the Subcommittee. I am writing to request information that would assist the Subcommittee in its deliberations on this bill.

Pursuant to the Supreme Court's decision in *Delaware v. New York*, 113 S.Ct. 1550 (1993), the right to escheat unclaimed owner unknown securities distributions falls to the state of incorporation of the intermediary in possession of such unclaimed distributions. H.R. 2443 proposes to override the Supreme Court's decision by awarding the right to escheat those unclaimed distributions to the states in which are located the principal executive offices of the issuers of the distributions.

In order to better evaluate H.R. 2443, the Subcommittee is seeking to gather data regarding the extent to which states currently escheat unclaimed owner unknown intangible property from banks. Pursuant to this goal, it would be extremely helpful if you could provide the Subcommittee with the following information for each of the last three years ending December 31, 1993, or if such data is not available for 1993, for each of the most recent three years for which such data is available:

1. The total amount of unclaimed intangible property escheated to your state; 103.6 million

2. Of the above total, the amount which consists of unclaimed securities distributions ; 12 mil

3. Of the total set forth in response to item 2, the amount of such property received from:
   (1) banks, thrifts, trust companies and other depository institutions, and .4
   (2) brokers, securities firms and other non-depository institutions; .9

Honorable Martha Whitehead
Page Two

4. Of the total amount of all unclaimed securities distributions escheated to your state, the total amount received because the owner of the property was unknown; 3

5. Of the total set forth in response to item 4, the amount received from 350,
(1) banks, thrifts, trust companies and other depository institutions, and
(2) brokers, securities firms and other non-depository institutions; 2

In responding to the above questions, owner-unknown property should be defined in accordance with the Supreme Court decision in *Delaware v. New York*.

The Subcommittee would appreciate any efforts you can make to report this information to us at your earliest convenience, as we would like to have received responses from all 50 states by Friday, March 11. Should you or your staff have questions, please do not hesitate to contact Paul Hannah of the Subcommittee staff, at (202) 226-3280.

Again, thank you for your help with this effort. All best wishes,

Sincerely,

Steve Neal

STEPHEN L. NEAL
Chairman

sln:pfh

**TESTIMONY OF THE HONORABLE THOMAS R. CARPER,
GOVERNOR OF THE STATE OF DELAWARE
BEFORE THE FINANCIAL INSTITUTIONS SUPERVISION,
REGULATION, AND DEPOSIT INSURANCE SUBCOMMITTEE
OF THE HOUSE BANKING COMMITTEE
CONCERNING H.R. 2443,
THE EQUITABLE ESCHEATMENT ACT OF 1993**

March 22, 1994

INTRODUCTION

I welcome the opportunity to address this Subcommittee on this topic of immense importance to my State, and thank the Chairman, Ranking Member, and the Subcommittee for affording me the opportunity to do so. I am submitting with my testimony for the Subcommittee's consideration a statement from Nelson S. Kibler, an expert on the back office operations of securities firms, which discusses the handling of unclaimed securities distributions held by financial institutions.

It is time to shine some light on this legislation. At the end of the day, I am confident that this Subcommittee and all of your colleagues in Congress will study the issue carefully, ask the tough questions that need to be asked, and come to realize that H.R. 2443 is misguided public policy that should not be enacted.

I oppose H.R. 2443 because:

° it would significantly harm my State and other financial-center States -- without conferring any significant benefit on any other state;

the net benefit for most other states would be at best negligible and more likely they would suffer a net loss when all the costs are factored in;

- the bill would needlessly upend decades of commercial law and practice that businesses, financial institutions, and individuals have relied upon; and
- it is extremely unfair.

Let me explain briefly what I mean by "unfair." First, through its unconscionable retroactivity provisions, H.R. 2443 seeks to reach back and take away money lawfully collected and already expended on proper and important state functions and services, going back not just years but decades.

Second, H.R. 2443 is equally unfair in how it would address future funds. It seeks to cherry-pick one narrow source of escheat even though the states share widely in overall escheat revenues. In addition, H.R. 2443 would seize from a few states the benefits of their human resources, and thus open the door to all sorts of supposedly "equitable" schemes that could force various states to disgorge lawfully collected funds for redistribution on the ground that all the states should share the benefits of each state's own unique resources.

What about, for example, a federal law directing the equitable sharing of oil and gas severance taxes? H.R. 2443 would set a direct precedent for such a scheme. If that proposal were before you, I can assure this Subcommittee that my fellow governors from the energy producing states would be sitting right here where I am now decrying the unfairness of such a proposal. Yet this bill countenances a similar attack on a resource that my small state has carefully developed over the years -- a structure for corporate formation and governance that many in the nation think is the most suitable under which to conduct business.

Finally, H.R. 2443 is unfair because it would alter without justification a method of distribution that most closely approximates the distribution that would occur if the principal rule governing escheat -- the so-called "primary rule," which is long-established and universally accepted -- could be applied. A careful examination of the nature of the funds at issue demonstrates that, in most cases, the unknown owners of these funds are <u>not</u> individuals spread throughout the United States, but are institutions headquartered and/or incorporated in the financial-center states, and therefore under the "primary" rule the funds would escheat principally to those states. Under the established "secondary" rule, those funds do go to those same financial-center states; under H.R. 2443, they would be taken away from those states.

I will first provide some background so that these points may be better understood. This is an issue that seems to suffer from a lack of understanding of what really underlies the funds at issue and the consequences of the path H.R. 2443 seeks to take.

BACKGROUND

As this Subcommittee knows, H.R. 2443 seeks to overturn part of the long-established set of rules governing unclaimed property that the United States Supreme Court reaffirmed in 1993 in Delaware v. New York. That case, parts of which are still pending before the Special Master appointed by the Supreme Court, involved only the relative rights of the states to escheat unclaimed dividends and interest owed on securities that belong to persons who cannot be identified and that are held by financial intermediaries such as banks, brokers, and trust companies. These unclaimed "owner unknown" distributions of dividends and interest represent less than 0.02% of the total dividends and interest paid in a year. They are overwhelmingly overpayments received by brokers or banks that are owed to other financial institutions, not to individual customers.

Accordingly, H.R. 2443 is _not_ an investor protection bill that would encourage financial intermediaries to track down long-lost investors to whom distributions are owed. This bill does _not_ concern funds that are owed to the individual customers of the brokers or banks. Instead, these funds arise from the trading practices of the securities industry.

Let me explain. Banks, brokers, and trust companies often hold stock certificates or equivalent investment documents in their own name, called the "street" name, for their customers, who are the "beneficial owners." The overpayment/underpayment situation that H.R. 2443 addresses happens because a physical stock certificate can change hands between financial institutions and yet not have been re-registered in the name of the new financial institution owner. If during that period, before the certificate is re-registered, the issuer establishes a record date for a dividend or other distribution, the distribution goes to the registered owner, not the new financial institution which is entitled to the distribution. Because there are many such transactions in a stock or other issue, the overpaid institution cannot readily establish which transaction led to the overpayment, and so the institution will not know to which other institution it owes the funds.

In most cases, the institutions involved in these transactions eventually find each other and settle their accounts, but there are cases where they do not. When they do not find each other within the period prescribed by state escheat law, the unclaimed money still being held by the financial institution that received it incorrectly is subject to escheat. It is these monies, which are collected by one financial institution but are owed to another financial institution, that H.R. 2443 aims to redistribute in a harmful and inequitable manner.

The reason why individual customers are not harmed by the transaction errors that lead to these unclaimed funds is that brokers and other financial intermediaries pay the proper distribution to all their customers -- the "beneficial owners" -- whether or not the institution itself actually received the proper distribution. Generally speaking, an "owner-unknown" distribution subject to escheat occurs when the institution that has not received the full amount of the distribution it is owed goes ahead and pays the individual customer, but then cannot find the institution that received the corresponding excessive distribution.

It is also important to understand that rules governing escheat of these owner-unknown distributions have no effect on the much more common cause of unclaimed distributions on stocks and bonds -- "lost" stockholders and "lost" customers. An SEC staff study estimates those distributions total more than $10 billion in the aggregate. These "lost stockholder" funds escheat today to all fifty States under three decades of legal precedent reaffirmed by the Supreme Court in Delaware v. New York. These funds escheat to the states under the "primary rule," which gives the right of escheat to the state of the "lost" person's last-known address. Thus, if an individual stockholder moved from Minnesota to Delaware, but failed to notify her broker of her new address, any unclaimed distributions owed to this "lost" person would eventually escheat to Minnesota, the state of the individual's last-known address.

It is important to keep this "primary rule" in mind, because it is a rule to which we understand no state objects. Every state is entitled under the current rules to escheat the unclaimed funds of its citizens when the holder's records show a last-known address in that state.

It is only because the "primary rule" cannot be used to govern escheat of these distributions that the "secondary rule" under attack in H.R. 2443 comes into play. Yet, as I will explain later in my testimony, the long-established "secondary rule" comes much closer than does H.R. 2443 to replicating the distribution that would occur under the "primary rule" if the owners of these distributions could be identified.

<u>H.R. 2443 INEQUITABLY SEIZES AND REDISTRIBUTES REVENUES PROPERLY COLLECTED BY, AND VITAL TO, DELAWARE AND OTHER FINANCIAL-CENTER STATES.</u>

H.R. 2443 is an economic dagger pointed at the heart of my State of Delaware, and the financial-center States of New York and Massachusetts. One of the most important sectors of Delaware's economy is the financial service sector. Mr. Chairman, financial services play as an important role in my state as agriculture does in your State of North Carolina, and as tourism does in Congressman McCollum's State of Florida. H.R. 2443 would take away from the financial-center states hundreds of millions of dollars of revenues that we cannot replace from other sources. These are monies Delaware needs to educate its children to compete in the 21st century, to provide for those of its citizens unable to help themselves, to keep police and firefighters out on the streets, and to maintain the quality of those streets.

The very title of H.R. 2443 speaks of equity. But it is H.R. 2443's attack on a proper revenue source of a few states that is inequitable; the current division of the escheat of these broker account funds is already equitable. There is simply no unfairness in a state claiming the right to escheat one particular, comparatively small category of unclaimed intangible property held by institutions incorporated under its laws. Indeed, the United States Supreme Court recognized the fairness of the system that H.R. 2443 seeks to overturn and the inequity of the system that H.R. 2443 would establish. The Court said, "we detect no inequity in rewarding a State whose laws prove more attractive to firms that wish to incorporate. Precedent, efficiency, and equity dictate the rejection of the . . . 'principal executive offices' proposal" -- the proposal H.R. 2443 seeks to resurrect.

H.R. 2443's Retroactivity Provisions Are An Unconscionable And Unconstitutional Intrusion Upon The States.

I will not spend much time discussing the retroactive provisions of H.R. 2443, because I cannot believe that this Subcommittee or this Congress would allow such an unfair, inequitable, and I believe unconstitutional idea to be enacted into law. Although the retroactive application of H.R. 2443's new standard is the pot of gold at the end of the rainbow that this bill purports to promise to supporters, the idea that Congress would attempt to take lawfully collected and expended funds of states and mandate redistribution of those funds to other states is both shocking and unconscionable in the extreme to me. Under this aspect of the proposal, states would be permitted to rove the land and seek to reach into the treasuries of other states to demand payment of money long ago lawfully collected and lawfully spent. The impact on a small state like Delaware would be devastating, but many other states would be seriously affected as well.

Congress has always been leery of statutes that would be applied retroactively to alter rights and responsibilities. This statute would reach back in the most dramatic and destructive manner, and invade what is the heart of state sovereignty and state responsibility. I promise you that if this provision is enacted, Delaware and others would fight it in the courts as long as necessary, since we believe it is patently unconstitutional. But I trust it will not come to that, because this body will recognize the damage it would do by endorsing such an unprecedented invasion of state resources.

<u>By Seizing Even Prospectively Upon The Resources Of A Few States And Seeking To Redistribute Them, H.R. 2443 Would Set A Dangerous Precedent To Which All States Are Vulnerable.</u>

Even looking at its impact if applied prospectively only, H.R. 2443 in effect would unfairly cherry-pick one small part of the funds that escheat annually throughout the United States. For example, in the 1989-1990 fiscal year, $1.2 billion was remitted to the states, distributed throughout the United States. Different states are able to escheat different kinds of funds under the applicable rules, with the result being a wide spread of funds throughout the United States. This legislation focuses on a narrow slice of the entire pie, and selectively declares that Delaware and the financial-center states are to be singled out and told that the rules should no longer apply to them.

But the fundamental unfairness of this legislation is even more apparent when one takes an even broader perspective. States benefit to different degrees from the natural and human resources that are within their jurisdictions. Delaware, a small state with limited natural resources, has worked hard to develop certain man-made resources, which produce certain benefits for it. An attack on the distribution that results from this resource can only be justified if

Congress is prepared to redistribute the fruits of the particular resources found in other states.

Consider these other sorts of "equitable" legislation that would follow from this notion that states should be forced to share revenues attributable to their unique resources. How about a bill requiring the disgorgement of state oil and gas severance taxes on the premise that all states should share more equitably in the revenues generated by natural resources found in the energy-producing states? H.R. 2443 would also set the stage for a nationwide pooling of the Northwestern states' revenues earned directly or indirectly from logging. Or why not require states with coastlines to share beach season tourist revenues with states not so fortunately situated? Indeed, under the logic of H.R. 2443, should not all states share more equitably in the resources created by the tourist attractions, be they natural or man-made, found in some states and not others? All these proposals follow once Congress gets into the business of redistributing lawfully collected revenues from one state to another, as it would be doing in H.R. 2443.

I personally believe that this is not a road that Congress should start down. Yet that is precisely the trail that this bill would blaze. Our country has found a lot of its strength in the competition between states to develop their own resources and to benefit from those resources. I do not believe Congress should start tampering with that process; yet that is what H.R. 2443 would do.

<u>The Benefits Gained At The Expense Of Financial-Center States Are Illusory, And The Burdens H.R. 2443 Would Impose On Every State Are Enormous.</u>

The question, then, is what would this bill provide prospectively to the states that seek to attack the resources of the financial-center states in this ill-advised manner? No matter how you look at it, the answer ranges from "a net loss" to "not much," and the ultimate costs would likely outstrip any marginal new revenues.

Even looking at just the redistribution of the funds at issue in the litigation -- funds previously claimed by New York -- it is clear that most states would gain little from the enactment of this unfair and cumbersome system. But one really needs to look beyond just the funds at issue in the litigation, because many states have failed to consider the effect of H.R. 2443 on funds they now escheat from financial institutions chartered in their states and from federally chartered banks headquartered in their states.

Many banks are the holders of large quantities of the type of funds that H.R. 2443 addresses. Generally, this occurs when a bank trust department is acting in a fiduciary capacity as a custodian of securities. In other words, your own state may now be benefitting from the secondary rule affirmed by the Supreme Court in Delaware v. New York. If H.R. 2443 is enacted, those funds would be disbursed mostly to a few large states which house the various securities issuers' principal executive offices.

Moreover, I understand that the financial institutions are moving to increased immobilization of stock certificates and other physical securities. As I understand Mr. Kibler's statement explains in more detail, as the physical handling of certificates is reduced, there would be an ever-diminishing pool of funds to be obtained from the high cost administrative system that H.R. 2443 would require. As computerization has increased and other advances in the operations of the marketplace have occurred, I understand that not only is there a decreasing percentage of owner unknown property, but there is an increasing percentage of claims later made and collected against the escheat funds by the rightful owners.

But the story gets worse. Even in those states that can count themselves among the modest "net winners" from the redistribution of this narrow slice of escheat funds, the net gain will likely be wiped out by the costs to the states and their subdivisions. For instance, what piece of the pie are the contingent fee lawyers who are pushing this legislation on behalf of the states taking? What about the substantial costs of administering this new system that will be imposed on the states from the date of enactment? Each state, upon demand by any other state, would be subject to audit. This bill would require every single state to open up its books for examination by all other states, one at a time if necessary, to see what a state took from banks, depositors and brokers that might have turned over "securities distributions" issued by companies headquartered in every other state. Every State Office of Unclaimed Property Administration would have to report, issuer by issuer, what it took from every entity -- even if those monies were from local banks or brokers. Every state would have to devote many hours to sorting out records, tallying up what it would owe to every other state, and figuring out what any other state might owe it. Responding to the bill's requirements -- and the dozens of audits that would become an annual exercise -- could paralyze every state's Office of Unclaimed Property Administration.

I shudder to think of the administrative and budgetary burdens of locating and accounting for every record, and hiring or reassigning personnel to comply with audits initiated by other states, and the costs associated with the inevitable litigation over disputed claims to the funds. Given that most of the escheats are for very small dollar amounts, states would expend a vastly disproportionate amount of resources to chase what amounts to very little revenue.

And what about the higher costs of issuing state and municipal debt that will inevitably follow? As every member of this Subcommittee knows, H.R. 2443 covers municipal securities issues. As I understand Mr. Kibler's statement confirms, H.R. 2443 would impose enormous administrative expenses on banks and brokers that underwrite municipal securities. These institutions would have to pass some of those costs through to cities and states in the form of higher underwriting fees to issue municipal debt.

My point is that this legislation has been promoted as a great way to raid the treasuries of a few states and generate revenue for all the others. Putting aside the inequity of that raid, the truth is that many more states may be net losers under this scheme. We suspect that most states have not even looked into this matter, let alone looked closely. They may not know that it is an issue and that this money would have to be disgorged and redistributed, with costly consequences that follow from the elaborate system that this bill would create. Private promoters of this bill may have told state and federal officials about the alleged benefits of the bill but not about the burdens it would impose.

The representatives of many states had better look long and hard at the bill of goods they are being sold before they buy. A Member who votes for this bill may be giving his or her state's money away. I ask the members of this Subcommittee to consider carefully and scrutinize closely the data to determine whether this mugging of the financial-center states is really worth much, if anything, to your constituents.

<u>H.R. 2443's Unjustified, Heavy Burden Would Rest Not Only On States, But Also On Banks, Brokers, and Other Financial Institutions.</u>

It would be bad enough if this legislation would impose only the imbalance of benefits and burdens on the states themselves that I have discussed already. But the costs of this legislation would be much greater, because it would impose enormous costs on the financial institutions that hold these funds.

The securities and banking industries have spoken for themselves on this issue, and I understand Mr. Kibler speaks to it in his statement to this Committee, but let me briefly summarize the problem. In their <u>amici curiae</u> brief filed with the Supreme Court, the

Securities Industry Association and American Bankers Association described the proposal now contained in H.R. 2443 as an administrative nightmare. The bill would require every financial institution, no matter how small or regional their business might be, to become experts on the substantive and procedural rules and regulations governing escheat in every state, to apply properly those rules on pain of penalty for mistakes, to open itself to audit by each state, separately, over tens of thousands of items every year, and to reconstruct going back for years and to then track on a current basis where tens of thousands of corporations maintain their principal executive offices.

It is easy to see the financial industry spending more on compliance than the funds at issue. While the lawyers and consultants who would profit from the flurry of work that would result from the enactment of H.R. 2443 may think this a good use of money, I, for one, would prefer to see these resources devoted to serving the needs of my citizens and your constituents. They would be the ultimate losers under H.R. 2443.

<u>The Current Legal Standard, Not H.R. 2443, Comes Closest To Sending The Funds To Where They Belong Under the Universally-Accepted "Primary Rule" Of Escheat.</u>

Finally, the irony is that the current legal standard does a much better job than would H.R. 2443 in mimicking the distribution of funds that occurs under the so-called "primary rule," which everyone accepts as a fair and proper method for escheat. Yet, Congress is being asked to throw over the fairer method of distribution under a fatally flawed claim that H.R. 2443 would send the money where it properly belongs.

Thirty years ago, the Supreme Court built the primary rule governing escheat on the principle that "a debt is property of the creditor." Where an individual creditor has a last known address in a state, the debt has a contact with that state and the primary rule allows that state to escheat the unclaimed distribution and protect the interests of its citizens.

The fairest "secondary rule," therefore, would be the one that comes closest to replicating the goals of the primary rule. For the reasons that I tried to outline earlier in my statement and as I understand Mr. Kibler explains in more detail, most of these owner unknown distributions are in fact funds that are due and owing to institutions headquartered or incorporated in the financial-center states, not to the general population or even to the general population of investors. In other words, if the owners of these funds could be identified, these funds principally would escheat under the primary rule to the financial-center states.

That is also where the current legal rules send the funds. H.R. 2443 would take the funds away from those states, and thus effectively attack the principles underlying the primary rule without explanation or justification.

Moreover, adoption of H.R. 2443 would make it more difficult for the rightful owners of funds to obtain them. A significant portion of unclaimed securities distributions are reclaimed by their rightful owners after they have been subject to escheat by a state. Under the current rules, if the owner of the funds covered by H.R. 2443 comes forward, it need only go to the state of incorporation of the institution that had been holding the funds -- a relatively easy process. Under H.R. 2443, however, the claimant would have to identify the issuer of each particular distribution, identify the state of the principal executive offices of that issuer at the time the distribution was made many, many years earlier, and seek to obtain the funds from that state. Such a system would not protect the creditors' rights, but would make those rights more difficult and more expensive to enforce. Again, there is no good justification for this change, a change that would undermine the central goal of protecting creditors' rights.

CONCLUSION

In sum, H.R. 2443 is extremely unfair, unduly expensive, and bad public policy. I believe few states, if any, would benefit significantly if H.R. 2443 became law, but every state would be a sure loser for the ominous precedent it would set for future raids upon the resources of states. H.R. 2443 represents an unwarranted and unseemly attack on my state and a few others. It is ill-conceived and unwise. I am convinced it will come back to haunt the states that are now promoting it and the Members of Congress who have been quick to hop on this bandwagon, thinking they are getting something for nothing for their states.

I urge every member of this Subcommittee and of this Congress to stop and think once, twice, three times about what H.R. 2443 would really do. If you do, I am convinced you will conclude that this legislation should fail.

Thank you for inviting me to testify here today and for your attention.

STATEMENT OF NORTH CAROLINA ATTORNEY GENERAL MICHAEL F. EASLEY
ON H.R. 2443
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS SUPERVISION,
REGULATION AND DEPOSIT INSURANCE
COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS
HOUSE OF REPRESENTATIVES
March 22, 1994

Mr. Chairman and Members of the Committee:

As the Attorney General of the State of North Carolina, I appear before you today to express my strong support for H.R. 2443, the Equitable Escheatment Act. Unclaimed securities distributions are paid by taxpayers and companies headquartered in all States. Unless the legislation is enacted, however, only three States will divide the more than $1 billion of such funds already seized by New York and the $100-150 million that will accrue annually. H.R. 2443 is needed to prevent that inequitable outcome and to ensure that all States recover distributions that originated within their borders.

North Carolina has been actively involved in the litigation leading to this legislation for 5 years. We supported before the Supreme Court, along with 46 other States, the rule embodied in H.R. 2443; and we remain committed to the enactment of that rule and its application to the funds New York has seized.

I assure you that my State -- contrary to the assertions of opponents of the legislation -- has not been acting against its interest all this time, wittingly or unwittingly. To the contrary, we have concluded, after careful evaluation and analysis, including review of the unclaimed property reports submitted by the largest banks in North Carolina, that we will benefit significantly from enactment of the rule embodied in H.R. 2443 that equitably allocates owner-unknown unclaimed securities distributions, as will virtually all States.

Congressional action must be swift. The Supreme Court's decision in Delaware v. New York, 113 S. Ct. 1550 (1993), did not end the litigation, as the Court remanded the case to its Special Master for further proceedings. The case is thus presently before the Master, but it soon will be concluded. On March 15, 1994, the Special Master issued a Report recommending that the Court grant Delaware's Motion for leave to dismiss its Complaint; and two weeks earlier, the Master issued a Scheduling Order setting a discovery deadline of April 30, 1994. Responses to Massachusetts' summary judgment motion are due March 22, 1994.

H.R. 2443 must be enacted before the Special Master makes his final recommendation and the Supreme Court enters a final judgment -- which could occur in the next 60-90 days -- in order for the bill's provisions that address the $1 billion taken by New York to be constitutional. We have sought for five years an equitable share of the distributions New York has systematically and wrongfully seized; time is of the essence if the 47 States are to accomplish that objective.

Allow me to provide some background to this legislation, which will demonstrate both the depth of its support and the need for prompt action. As you know, H.R. 2443 was introduced as a result of the March 30, 1993 decision by the U.S. Supreme Court in Delaware v. New York. The suit was filed to establish which States are entitled to more than $1 billion of securities distributions New York has seized from brokerage firms, banks and depositories when the owners of the distributions are unknown. While Delaware and New York were the initial parties when Delaware sued New York in 1988, every other State has since intervened in the litigation.

Forty-seven of the intervening States, including North Carolina, supported the recommendation of the Special Master appointed by the Court to take evidence and hear arguments. The Special Master -- former Dean of the University of Virginia School of Law, President-designate of the University of Rochester, and a nationally recognized expert in debtor-creditor law -- concluded that the State entitled to custody of owner-unknown securities distributions should be the State in which those distributions originated. Thus, owner-unknown interest paid by a North Carolina municipality would be returned to North Carolina; and owner-unknown dividends paid by a company with its principal executive offices in North Carolina would be returned to North Carolina.

The Supreme Court, stating that it was constrained by past precedent, rejected the recommendation of the Special Master over the dissent of Justices White, Blackmun and Stevens. The Court instead adopted the position advocated by New York and

Delaware, namely, that the State of the conduit intermediary -- the broker, bank or depository that happened to be holding the funds when they became "stuck" in the course of distribution from the issuer (originator) of the funds to the beneficial owner -- is entitled to custody of owner-unknown funds.

Because virtually all large brokerage firms are incorporated in Delaware, and most money center banks and the Depository Trust Company are chartered in New York, the Court's decision, if allowed to stand, would result in those two States dividing virtually all the funds at issue in the litigation, with Massachusetts recovering $40-50 million as well. The 47 other States collectively would receive less than $2 million.

The Court was not blind to the fact that its Master thought such an outcome would be grossly unfair and that the vast majority of States would disagree with its decision. It invited this legislation, stating that "[i]f the States are dissatisfied with the outcome of a particular case, they may air their grievances before Congress," which "may reallocate abandoned property among the States without regard to this Court's interstate escheat rules."

In fact, the Court pointed out that Congress had previously done just that, when it overturned the last Supreme Court escheat decision. In 1974, Congress overrode the Court's inequitable decision in Pennsylvania v. New York, which gave owner-unknown unclaimed money order funds to one State --

New York -- and equitably reallocated the funds to all the States from which they originated. The Supreme Court in its Delaware v. New York opinion stated that Congress "may ultimately settle this dispute through similar legislation."

And so the 47 States are now before Congress seeking to put into law a rule they have for years fought for and supported. Experts will testify about the ease with which the legislation can be implemented. I wish only to quote from the Special Master's decision in that regard, with which the Supreme Court did not disagree: "a focus on the location of the issuer is simple and inexpensive to implement"; and "[the] principal executive offices [of a corporate issuer] should . . . be virtually as easy to determine as its jurisdiction of incorporation." Report at 39, 43 n.41.

Before turning to the constitutional aspects of Congress overturning the Supreme Court's decision, I would like to address several arguments raised by opponents of the legislation.

It Is Appropriate For Congress To
Address The Escheat Of Securities Distributions

Some opponents of the legislation have argued that it is inappropriate for Congress to single out one type of property (securities distributions) for legislative action. This misstates the issue. The law is clear and fair with respect to other types of unclaimed intangible property; and there are no disputes among the States with respect to the escheatment of other property. The State with the strongest tie to unclaimed property, i.e., either the State of the intended recipient or of the originator, is entitled to escheat it.

Thus, all States agree that when the owner of unclaimed intangible property is known, it escheats to the State of the intended recipient/owner. When the owner of such property is unknown, it escheats to the State of the originator. For example, if a North Carolina company sends a check to a Florida supplier, and the supplier fails to cash the check, the funds escheat to Florida. If, for some reason, the North Carolina company does not have records indicating the State of the last-known address of the payee, North Carolina -- the State of the originator -- escheats the funds.

Thus, except for the property covered by the Supreme Court's decision in Delaware v. New York, virtually all intangible unclaimed property goes to the State of the intended recipient, if known; and if unknown, it goes to the State of the originator. H.R. 2443 addresses the atypical case in which, absent legislation, neither the State of the originator nor the State of the intended recipient would be entitled to escheat the unclaimed property. This is because conduit intermediaries (brokerage firms and banks) have been interposed between the originators and the intended recipients of dividends and interest payments. The legislation conforms the treatment of unclaimed securities distributions to the treatment of other types of property -- the State of the originator escheats it when the owner is unknown. Unless H.R. 2443 is enacted, three States which have ties neither to the originator nor the owner of the property will escheat these funds merely because they are the States in which the conduit intermediaries happen to be incorporated.

I would add that it is ironic to hear that legislative action is inappropriate from the same States who argued -- in the Supreme Court -- that the 47-State position should be rejected because Congress is the body that can best fashion a rule for a single type of property when justice so requires. Thus, New York urged the Supreme Court to reject the Master's recommendation because the recommendation infringed upon Congressional prerogatives:

> Congress has the ability, should it be unsatisfied with the application of the Supreme Court's basic rules in this area to a particular type of transaction to change the rule with respect to that kind of transaction.

Exceptions of the State of New York to the Report of the Special Master at 74 (May 26, 1992). Delaware agreed, and argued that any change in the escheat rule "ought, institutionally, to be implemented by Congress in making an exception to the rules -- as it did in the money order situation -- rather than by this Court." Exceptions and Brief in Support for Plaintiff, State of Delaware at 52 (May 1992).

Just as it was appropriate for Congress in 1974 to enact a rule specific to unclaimed money orders and similar instruments to ensure their equitable distribution to all States rather than one, so it is appropriate for Congress to enact a rule specific to unclaimed securities distributions to ensure their equitable distribution to all States.

It Is Appropriate And Constitutional For H.R. 2443
To Apply To Distributions Already Seized By New York

The Special Master considered the "fairness" and "hardship" objections to requiring New York to disgorge the funds it has taken and rejected them. He concluded that New York's purported "hardship represents a calculated risk New York has imposed on itself, and not an unjust surprise or unfair burden." It could hardly be otherwise, given that New York's statute ignored the applicable Supreme Court precedents and did not even authorize it to escheat the funds taken. For example, New York's statute authorized it -- in contravention of Supreme Court precedent -- to take possession of unclaimed distributions "received" by brokerage firms in New York.

The recent settlement agreement between Delaware and New York confirms the need for the legislation to apply to funds New York has taken. Under their settlement, New York will pay Delaware $200 million out of Delaware's claim of $891 million, with New York keeping the rest. This is equal to $800 for each and every Delaware household. No other State would receive anything. New York plainly recognizes that it wrongfully seized the funds and that it must disgorge them. The issue for this Committee is whether Delaware should be the only State to which New York must make a fair payment from the $1 billion it has systematically taken since 1972.

For more than five years, the 47 States have attempted to recover from New York the funds it unfairly seized. Equity still supports our claim to those funds; and the Constitution creates no bar to H.R. 2443 achieving that result. As noted, the dispute over those funds is ongoing. The Supreme Court remanded the matter to the Special Master for further proceedings, and no final judgment has been entered in the case. As a consequence, it is constitutional for the legislation to apply to distributions seized by New York.

Although I do not purport to be a constitutional law expert, I have asked my staff to research and confirm my recollections about the finality of judgments doctrine. After researching the cases and consulting with various constitutional law experts, they confirmed my opinion. As recently stated by the Seventh Circuit, "[t]he principle that Congress may impose new legal rules applicable to pending cases was recognized by the Supreme Court almost two hundred years ago in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801)." Berning v. A.G. Edward & Sons, Inc., 990 F.2d 272, 277 (7th Cir. 1993). Thus, "[i]n civil litigation, . . . no person has an absolute entitlement to the benefit of legal principles that prevailed at the time the case began, or even at the time of the bulk of the litigation." Tonya K. By Diane K. v. Board of Educ. of Chicago, 847 F.2d 1243, 1247 (7th Cir. 1988) (citing Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) (upholding retroactive application of statute that reversed the Supreme Court's prior ruling in that case that plaintiff's claim was time-barred)).

The settlement agreement between Delaware and New York -- under which Delaware moved for leave to dismiss its Complaint without prejudice and without seeking Court approval of the settlement -- in no way affects this principle. As Judge Easterbrook wrote in upholding the retroactive application of a statute against a defendant with respect to claims reasserted by plaintiffs who had previously withdrawn their claims in 1984: "If the defendants wanted to have a judgment (vested or otherwise) on which to rely, they had to secure a dismissal with prejudice in 1984. They did not, and the Constitution does not give them as a gift what they failed to secure when they had the chance." Tonya K. By Diane K., 847 F.2d at 1247.

Indeed, New York and Delaware have assured both the Supreme Court and the Special Master that their settlement will in no way affect the claims of the other States to funds seized by New York. See Motion of Plaintiff, State of Delaware, for Leave to Dismiss its Complaint Without Prejudice at 5 (filed with Supreme Court on Jan. 21, 1994) (Delaware's motion "would not in any way affect the claims (both pending and proposed) between New

York on the one hand and the Intervenors (or any of them) on the other"); Response of Defendant, State of New York, to Delaware's Motion at 2 (filed with Supreme Court on Jan. 26, 1994) (same); Letter from New York Solicitor General Jerry Boone to the Special Master (March 14, 1994) ("It is inconceivable to us that the Intervenors could be prejudiced by [a grant of Delaware's motion]"). Neither New York nor Delaware has obtained a final judgment. The doctrine of separation of powers therefore does not prevent Congress from enacting legislation applicable to the funds New York has seized.

Unlike the present situation where no final judgment has been entered, Congress could not apply the 1974 money order statute to funds New York had already seized because the Supreme Court had entered a final judgment in favor of New York before Congress enacted the legislation. Pennsylvania v. New York, 410 U.S. 977 (1973) (adopting supplemental report of Special Master); 411 U.S. 902 (1973) (discharging Special Master). There was no constitutional bar, however, to the retroactive application of the 1974 money order statute to funds which the final judgment did not reach -- i.e., to funds that had not yet been turned over to any State. Congress accordingly retroactively applied the 1974 statute to money order funds that became unclaimed starting in 1965, nine years prior to enactment of the 1974 statute. There was no need for the legislation to reach back prior to 1965 because 1965 was the year the Supreme Court established, in Texas v. New Jersey, the rule under which New York had seized the funds. Thus, the 1974 money order statute was retroactive to the maximum extent permitted by the Constitution.

New York And Delaware Have Not Made
<u>A Good Faith Effort To Settle This Matter</u>

Opponents of the legislation have argued that the States can settle the matter among themselves, and that Congress should not interfere. More than nine months ago, the 47 States made a substantive settlement proposal both to New York and Delaware, involving specific amounts of funds. Indeed, counsel for all States traveled to Albany, New York, New York City and Wilmington, Delaware on more than one occasion. Counsel for New York and Delaware never responded to that proposal.

New York and Delaware nevertheless have argued for months that the legislation should not be moved forward because of the possibility of settlement. When counsel for New York and Delaware finally asked for a settlement meeting, in February, and counsel for the other States traveled from all over the country to attend, counsel for New York and Delaware did not put forth a settlement proposal. Instead, they put forward a series of "preconditions" to engaging in any substantive discussions, which they called a "framework."

New York and Delaware insisted that, before they would make any settlement proposal, State officials -- including the Governors -- of the 47 other States must agree to a series of preconditions that would infringe State sovereignty and compromise the ability of States to communicate with their elected representatives. Because of the confidentiality obligations imposed by New York and Delaware, I am not at liberty to disclose the contents of these preconditions.

Despite this non-proposal, because the 47 States have been sincere in their desire to attempt to resolve this matter amicably, they made another substantive settlement offer on February 16, 1994, which I submit to you as Exhibit A. The 47 States proposed that, over a period of years, New York pay the 47 States $250 million out of the $1 billion taken by New York and that H.R. 2443 be amended to have prospective effect only. The $250 million proposal represents about 31% of the $800 million the 47 States would receive under H.R. 2443, and is 25% more than the $200 million New York has agreed to pay Delaware.

New York rejected the 47-State offer and did not offer a counterproposal of its own, continuing its long-standing practice of not putting anything on the table to the 47 States. I submit to you as Exhibit B, New York's letter dated February 25, 1994, rejecting "the notion that New York should agree to pay other states anything."

It is clear beyond any doubt that, if this matter is to be resolved through a settlement, New York and Delaware will be motivated only by dramatic legislative progress. Notwithstanding New York's rejection letter, the 47 States stand by their proposal and are prepared to meet with New York and Delaware, unconditionally and around the clock, in an effort to negotiate a fair settlement. To this end, on March 18, 1994 the 47 States proposed further settlement discussions to commence tomorrow, and to continue each and every day thereafter until a settlement is reached or it becomes clear that no settlement can be reached. A copy of this proposal is submitted as Exhibit C to this Statement.

In closing, let me impress upon you that this willingness to engage in good faith settlement discussions will not slow down the imminent entry of a final judgment in Delaware v. New York. It should not -- let me repeat -- should not -- in any way slow the progress of this important and equitable legislation.

Thank you.

THE STATES OF ALABAMA, ET AL.
THE STATES OF TEXAS, ET AL.
THE STATES OF MICHIGAN, ET AL.
THE STATE OF CALIFORNIA

February 16, 1994

VIA HAND DELIVERY

Dennis G. Lyons, Esq.
Arnold & Porter
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20036

Charles A. Miller, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044

Re: Delaware v. New York, No. 111 Original

Dear Messrs. Lyons and Miller:

We are writing for the purpose of again engaging New York and Delaware in substantive settlement negotiations aimed at resolving the dispute over States' entitlement to unclaimed securities distributions. The 47 Intervenor States and the District of Columbia have made multiple substantive settlement proposals to New York and Delaware, the last in June 1993. We regret that New York and Delaware have not seen fit to extend the courtesy of a response to any of these proposals. Nevertheless, in the spirit of cooperation, and in the hopes that your clients will decide to pursue settlement negotiations in good faith, we again make a substantive settlement proposal, which we are prepared to recommend to our clients and the joint legislative leadership.

The Intervenors propose that New York (and/or Delaware) agree to pay the 47 Intervenor States and the District of Columbia $250 million, a portion upon settlement, with the balance to be paid over a period of time. The amount of the initial payment and the time period would be negotiated. In return for this payment, the Intervenors would agree to discontinue efforts to have H.R. 2443 and S. 1715 apply retroactively, and New York and Delaware would agree to support enactment of that legislation on a prospective basis. Further, the Intervenors would join Delaware and New York in moving for the dismissal (with prejudice) of the Delaware v. New York litigation.

We believe the $250 million payment to the 47 intervening States and the District of Columbia is eminently reasonable in light of New York's agreement to pay $200 million to Delaware -- which would receive less than $15 million under the legislation -- and Massachusetts' pending claim of approximately $50 million. The amount we propose to be paid to the Intervenors is far less than the $800 million New York would be required to disgorge to Intervenors under the legislation, as well as far less than the amounts escheated by New York since 1990, long after the lawsuit was filed. Indeed, our proposal would allow New York to keep well in excess of $500 million -- more than New York would turn over to all 49 States combined.

The Intervenors cannot accept the "framework" you set forth, on behalf of New York and Delaware, at the meeting held on Thursday, February 10, 1994, as a condition precedent to New York and Delaware making any settlement proposal. The commitments and conditions you would require State officials to make before receiving any settlement proposal -- which you insisted, over our strong objection, be kept confidential -- would both impinge upon State sovereignty and compromise the States' ability to communicate effectively with their Congressional delegations. Rather than negotiate a "framework," the Intervenors much prefer to commence immediately negotiating the substantive terms of a global settlement among all States

In light of your clients' failure to respond to our June 1993 (and earlier) settlement proposals, and so that your clients will not have the pretext of ongoing settlement negotiations to further delay Congressional consideration of H.R. 2443 and S. 1715, we are constrained to keep our proposal open for your clients' consideration only until the close of business, February 25, 1994.

We look forward to your response to our proposal

Very truly yours,

David C Mattax /ds

Dan Morales
Attorney General of Texas
David C. Mattax
Assistant Attorney General
P.O. Box 12548
Austin, Texas 78711
(512) 463-2018

Counsel for Plaintiff-Intervenor State of Texas and Liaison Counsel for Plaintiff-Intervenor States of Texas, et al.

Bernard Nash
Leslie R. Cohen
Dan Schweitzer
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

Special Counsel for Plaintiff-Intervenor States of Alabama, et al.

Dennis G. Lyons, Esq. and Charles A. Miller, Esq.
February 16, 1994
Page 3

James F. Flug /s
James F. Flug
Lee E. Helfrich
Lobel, Novins, Lamont & Flug
1275 K Street, N.W., Suite 770
Washington, D.C. 20005
(202) 371-6626

Counsel for Plaintiff-Intervenor States of Michigan and Maryland, Liaison Counsel for Plaintiff-Intervenor State of Nebraska and District of Columbia

Yeoryios C. Apallas /s
Daniel E. Lungren
Attorney General of California
Roderick E. Walston
Chief Assistant Attorney General
Thomas F. Gede
Special Assistant Attorney General
Yeoryios C. Apallas
Deputy Attorney General
1515 K Street, Suite 511
Sacramento, California 95814
(916) 323-7355

Counsel for Plaintiff-Intervenor State of California

COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N.W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000

TELEFAX (202) 662-6291
TELEX 89-593 (COVLING WSH)
CABLE: COVLING

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE: 071-495-5655
TELEFAX: 071-495-3101

BRUSSELS CORRESPONDENT OFFICE
44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE: 32-2-512-9890
TELEFAX: 32-2-502-1598

CHARLES A. MILLER
DIRECT DIAL NUMBER
(202) 662-5410

February 25, 1994

BY FACSIMILE

David C. Mattax, Esq.
Assistant Attorney General
State of Texas
Price Daniel Building
209 West 14th Street
Austin, Texas 78701

James F. Flug, Esq.
Lobel, Novins, Lamont & Flug
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005

Bernard Nash, Esq.
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

Yeoryios C. Apallas, Esq.
Deputy Attorney General
State of California
Department of Justice
455 Golden Gate Avenue
San Francisco, California 94102

Re: Delaware v. New York, No. 111 Original

Gentlemen:

This is in response to your letter dated February 16, 1994, addressed to Dennis G. Lyons and me and is written on behalf of both of us. Your letter states a purpose of "engaging New York and Delaware in substantive settlement negotiations" to resolve the escheatment dispute. Yet the balance of the letter seems calculated to avoid achievement of this stated objective, and instead to have been written for public or Congressional consumption.

New York and Delaware were serious in stating at the meeting of February 10, 1994, that they sought in good faith to discuss a negotiated resolution of the outstanding dispute. It was in furtherance of that intention that they insisted upon confidentiality in the negotiations. Confidentiality in negotiations to resolve disputes is the norm, in public as well as private matters. Confidentiality was adhered to in the negotiations that led to the agreement by New York and Delaware to settle the dispute between them.

Messrs. Mattax, Nash,
Flug, and Apallas
February 25, 1994
Page Two

Publicizing negotiations is antithetical to the development of mutual confidence and a willingness to compromise without which a real settlement is not possible. We do not believe that negotiating under normal confidentiality terms would, in your words, "compromise the States' ability to communicate effectively with their Congressional delegations."

At this point, your refusal to negotiate under normal conditions of confidentiality raises a real question whether your purposes are to use the negotiations to prejudice New York and Delaware in the legislative arena rather than genuinely to pursue a settlement. I have to say that the terms set forth in your letter do not diminish our concerns in this regard. The notion that New York and Delaware should agree to pay other states anything, let alone $250 million, for the privilege of supporting your proposed legislation, is not the kind of serious proposal that signals a real willingness to compromise.

New York and Delaware are willing to attempt settlement through good faith negotiations, and we urge you, in consultation with your clients, to reconsider your response to our proposals at the meeting of February 10 and to give serious consideration to the framework for negotiations that we laid out. If you are prepared to proceed on a confidential basis and to address the points that we laid out at the meeting, we stand ready and willing to work with you in an effort to resolve the issues.

We look forward to hearing from you.

Sincerely,

Charles A. Miller

mb

cc: Dennis G. Lyons, Esq.

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 6200
SAN FRANCISCO, CA 94102
(415) 703-1985

FACSIMILE: (415) 558-9514
(415) 703-1687

March 18, 1994

Dennis G. Lyons, Esq.
Arnold & Porter
1200 New Hampshire Avenue NW
Washington, D.C. 20036

VIA FAX

RE: *Delaware v. New York, 111 Original*
<u>Supreme Court of the United States</u>

Dear Mr. Lyons:

On behalf of Messrs. Nash, Flug and Mattax, I am responding to your March 18, 1994 letter, telecopied to us early this morning.

In your letter you misstate the record and characterize settlement discussions among us in a manner completely at odds with your posture during these discussions. It is obvious that you do so in an attempt to bolster New York and Delaware's position at the hearing scheduled for March 22, 1994. However, this is neither the time nor the place to correct the various inaccuracies in your letter.

We have always believed that it is in our respective clients' interests to attempt to reach an amicable resolution if at all possible. It was for that reason that we have continued to put concrete proposals on the table, to which New York and Delaware repeatedly and steadfastly have refused to respond. Nonetheless, in the continued spirit of compromise, we are prepared to consider a counter-proposal by New York and Delaware to the settlement proposal we made by letter dated February 16, 1994. Although you advised us by letter dated February 25, 1994 that the proposal contained in our letter was unacceptable, you failed to make a substantive counter-proposal. We remain prepared to meet with you and Mr. Miller unconditionally at any time to discuss whatever "good faith" counter-proposals you wish to make on behalf of your clients, a fact which we previously made clear.

We propose that the first meeting be held Wednesday, March 23, 1994, at 10:00 a.m., with follow-up meetings to be held each and every day thereafter until agreement is reached or it is clear that no agreement will be reached. Provided that you are

Dennis G. Lyons, Esq.
March 18, 1994
Page 2

prepared to make a substantive counter-proposal without preconditions, we are prepared to conduct the negotiations on a confidential basis.

Please let us hear from you at your earliest opportunity.

Sincerely,

DANIEL E. LUNGREN
Attorney General

Yeorgios C. Apallas

YEORYIOS C. APALLAS
Deputy Attorney General

cc: Charles Miller, Esq. via/fax

MICHAEL EASLEY

REPRESENTATION AGREEMENT

THIS REPRESENTATION AGREEMENT, made this 5th day of May 1993, by and between the Department of Justice of the State of North Carolina ("State") and Dickstein, Shapiro & Morin, 2101 L Street, N.W., Washington, D.C. 20037 ("the Law Firm").

W I T N E S S E T H

WHEREAS, brokerage firms and other intermediaries presently hold substantial sums of unclaimed distributions on securities, such as stock dividend and bond principal and interest payments ("Funds"); and

WHEREAS, the State of New York has taken possession of a portion of the Funds; and

WHEREAS, substantial amounts of such Funds are expected to continue to become unclaimed in future years; and

WHEREAS, the State believes that it is entitled to a portion of such Funds as unclaimed monies issued by the State, governmental subdivisions thereof, or issuers located within the State; and

WHEREAS, the Supreme Court of the United States recently decided Delaware v. New York, No. 111 Original, 1993 WL 87736 (the "Lawsuit") and remanded the proceeding to the Special Master for further determination; and

WHEREAS, the Law Firm has extensive experience pursuing unclaimed monies which rightly belong to the States, has extensive litigation, Supreme Court, administrative and legislative expertise, has experience in coordinating with the States on similar complex matters, and has successfully represented numerous States in such matters.

NOW, THEREFORE, the State hereby agrees to retain the Law Firm to represent the State under the following terms and conditions:

1. The Law Firm will review the State's abandoned property and related statutes and will propose any legislative modifications thereto which it deems advisable to improve the likelihood of the State recovering its share of the Funds which are now held and may in the future be held by brokerage firms and other intermediaries, by the State of New York, or by others.

2. The Law Firm will take whatever steps it deems advisable to effect the recovery of the Funds for the State, including, but not limited to, participating in <u>Delaware</u> v. <u>New York</u>, and instituting and/or participating in other judicial, administrative and legislative proceedings.

3. The State's share of the Funds which are the subject of this Agreement is the total of all unclaimed monies as to which the beneficial owners' last known addresses are unknown to which

the State is entitled pursuant to a judgment, settlement, legislation or otherwise.

4. It is understood by the State that, in order to effect the recovery of the State's share of the Funds, it may be appropriate for other States to join with the State in order to advance their mutual interests and to reduce the costs of the State. To this end, the Law Firm may represent other States in this matter, and the State acknowledges that the Law Firm presently represents 30 other States in this matter.

5. (a) For the services provided to the State under this Agreement, the State agrees that the Law Firm will receive a contingent fee equal to seven and one-half percent (7½%) of the first four million dollars ($4 million), five percent (5%) of the next two million dollars ($2 million), and two and one-half percent (2½%) of all Funds in excess of the first six million dollars ($6 million) which are the subject of this Agreement and which are recovered by or for the State as the result of a full judgment, settlement, legislation or otherwise, or a combination thereof. The phrase "recovered by or for the State," as used in this Subparagraph, is intended to encompass those Funds actually received by the State from New York as a result of the Lawsuit, as well as those funds paid to the State by another State, or by a brokerage firm or other intermediary that withheld payment from New York. The phrase "full judgment," as used in this Subparagraph, is intended to mean a recovery which has full

retroactive effect. If a full judgment is awarded, calculation of the State's contingent fee responsibility shall be limited to this Subparagraph (a).

(b) In the event the award in the Lawsuit does not provide for the recovery of a full judgment as described in Subparagraph 5(a), the State agrees that the Law Firm will receive an additional contingent fee equal to seven and one-half percent (7½%) of the first four million dollars ($4 million), five percent (5%) of the next two million dollars ($2 million), and two and one-half percent (2½%) of all Funds in excess of the first six million dollars ($6 million) which are the subject of this Agreement and which are recovered by or for the State, whether recovered by judgment, settlement, legislation or otherwise, or a combination thereof, from any person or entity for a period of twelve (12) full calendar years from the effective date of such resolution, plus the partial year of such resolution. For purposes of calculating the contingency fee payable under this Subparagraph (b), all Funds recovered under Subparagraph (a) as part of a partial recovery shall be added to the Funds recovered under this Subparagraph (b) (i.e., the Law Firm will receive a contingent fee equal to seven and one-half percent (7½%) of the first four million dollars ($4 million) recovered under Subparagraphs (a) and (b) combined, five percent (5%) of the next two million dollars ($2 million) recovered under Subparagraphs (a) and (b) combined, and two and one-half percent (2½%) of all Funds in excess of the first six million dollars ($6 million) recovered under Subparagraphs (a) and (b) combined).

6. The attorneys' fees payable in accordance with Paragraph 5 of this Agreement shall be paid directly to the Law Firm by any brokerage firm, intermediary or other entity that makes payment to the State. The balance of the State's recovery shall be paid by such brokerage firm, intermediary or other entity to the State, or otherwise as many be directed by the State. The Law Firm shall provide an accounting to the State with respect to all attorneys' fees received directly from any brokerage firm, intermediary or other entity pursuant to this Paragraph.

7. The attorneys' fees payable in accordance with Paragraph 5 of this Agreement shall become due and payable when and as Funds actually are disbursed to the State. If the State makes no recovery hereunder, the State shall have no obligation for attorneys' fees to the Law Firm for services rendered in connection with this Agreement.

8. The State will reimburse the Law Firm for that portion of the Law Firm's out-of-pocket disbursements ("Disbursements") which are reasonably, ordinarily and necessarily incurred in connection with the services rendered under this Agreement and which are fairly attributable to the State. The phrase "fairly attributable" means that proportion of total Disbursements which corresponds to the State's proportion of the total population of those States represented by the Law Firm in

this matter. It is further agreed that such Disbursements will be paid by the State monthly upon presentation of appropriate statements by the Law Firm; provided, however, should any unusual Disbursements be contemplated, the Law Firm will not make such Disbursement unless and until the Law Firm receives authorization from the State for such Disbursement. The total amount payable by the State to the Law Firm for such Disbursements in State fiscal year 1993 and subsequent fiscal years shall not exceed two thousand dollars ($2,000.00) in each fiscal year, plus any amounts that the United States Supreme Court orders to be paid for the Special Master's fees and expenses, not to exceed five thousand dollars ($5,000.00) per fiscal year, without mutual agreement of the State and the Law Firm by amendment of this contract.

9. This Agreement may be terminated for cause by the State upon thirty (30) days written notice; provided, however, that in the event the State recovers Funds covered by this Agreement and for purposes of calculation of the Law Firm's contingent fee amount, the Law Firm shall be paid a prorated sum calculated by multiplying (i) the Funds recovered by the State, by (ii) the sliding scale contingent fee formula specified in Paragraph 5, by (iii) a fraction, the numerator of which is the time spent by the Law Firm up to the point of termination of this Agreement and the denominator of which is the total amount of time spent by the Law Firm in obtaining a recovery in this matter.

10. The Law Firm will provide the Attorney General with periodic reports, not less often than quarterly, describing (a) activities since the last report; (b) plans for future activities; (c) an explanation of the strategy being employed; and (d) any scheduling, filing and/or calendaring information. The Law Firm, from time to time, also will consult with and will make recommendations to the Attorney General on the specific courses of action which should be pursued either individually or in combination with other States.

11. The Law Firm, and individual attorneys of the Law Firm working on this matter, are deemed by the Attorney General to be special counsel to the State in connection with the services to be rendered under this Agreement. In all proceedings which are contemplated by this Agreement, the Law Firm and the Attorney General shall enter an appearance as co-counsel for the State.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

DEPARTMENT OF JUSTICE

By: ______________________
MICHAEL F. EASLEY
Attorney General

DICKSTEIN, SHAPIRO & MORIN

By: ______________________
BERNARD NASH
A Member of the Firm

WRITTEN TESTIMONY FOR G. OLIVER KOPPELL,
ATTORNEY GENERAL OF THE STATE OF NEW YORK

HEARINGS ON H.R. 2443
MARCH 22, 1994

My name is Oliver Koppell, and I am the Attorney General of the State of New York. I am here to testify in strong opposition to H.R. 2443, the so-called Equitable Escheatment Act. Far from equitable, the bill before you is an ill-disguised attempt by 47 states to confiscate money from the Treasuries of New York, Delaware, and Massachusetts and share it among themselves. To call this "confiscation" is no exaggeration. New York lawfully collected and spent the funds that would be appropriated from it by H.R. 2443 -- and the Supreme Court of the United States confirmed that. H.R. 2443 also would alter the laws of escheat going forward in a way that contradicts all common sense of escheat law. For both of these reasons, I urge you to oppose this bill.

I. Delaware v. New York

I will begin with an overview of the litigation that led to the introduction of H.R. 2443 last year. In 1988, Delaware sued New York to recover money New York had escheated from brokerage houses incorporated in Delaware but located in New York. The money was securities distributions -- like interest on bonds or stock dividends -- that had no known owner. Delaware claimed that it was entitled to escheat these amounts, because the holder of the money -- the broker --

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was incorporated in Delaware. Massachusetts eventually made an identical claim for amounts that had been held by Massachusetts-incorporated brokers.

Sensing opportunity for unexpected enrichment, all 47 other States and the District of Columbia entered the litigation. These "Intervenors" advanced various theories urging the Supreme Court to change longstanding rules of escheat so that the owner-unknown money New York had collected over the past twenty years would go to all States. The Supreme Court flatly rejected the Intervenors' theories. The Court held that the longstanding rules of escheat would not be changed. Under these longstanding rules, New York was fully entitled to keep all the owner-unknown distributions it escheated from New York banks and brokers. The only amounts it was not entitled to were distributions received from brokers incorporated in Delaware and Massachusetts.

It is important to understand that the rules affirmed by the Court do not say, as the Intervenors would suggest, that "all lost dividends and interest go to New York, Delaware, and Massachusetts." Under the "primary" rule for escheating these moneys, if the identity and address of the owner of a dividend issued by AT&T is known but cannot be found, the dividend funds escheat to the state of the owner's last-known address, our best guess at where the owner is located. That address can be North Carolina, Texas, Florida, Missouri, or anywhere -- and that State would escheat the money. That way, if the lost owner realizes that the AT&T dividend was not received, the money can be claimed from his or her state.

The "backup" rule -- the rule that would be changed by H.R. 2443 -- applies only when the identity and address of the owner is not known. In that case, the AT&T dividend escheats to the state in which the holder of the money -- usually a broker or bank -- is incorporated. As with the primary rule, that state can be North Carolina, Texas, Florida, Missouri, or anywhere. The Supreme Court favored this traditional backup rule for two reasons. First, it provides certainty about where to escheat the dividend. We can always tell where a broker or bank is incorporated. Second, it sends the money to the state of the entity -- the broker or bank -- that has the closest connection to the dividend's real owner. Decades of Supreme Court decisions and commercial law convinced the Court that this was the right rule.

As between New York and Delaware, the litigation is over. The two States reached a settlement under which New York will pay Delaware $200 million in damages for escheating money that should have gone to Delaware. Delaware has moved to dismiss its complaint without prejudice, and the Special Master recently recommended that the motion be granted by the Supreme Court. New York is now engaged in settlement negotiations with Massachusetts and anticipates agreement shortly. The Intervenors have continued to raise various claims against New York to prolong the litigation, but none of the claims involves significant amounts.

II. H.R. 2443

That brings us to the bill before this Committee. H.R. 2443 would change the longstanding "backup" rule that I just described. Instead of sending the owner-unknown AT&T dividend to the State where the holder -- the broker or bank -- is incorporated, the new rule would give escheatment rights to the state where the principal executive office of AT&T -- the issuer that originally paid the dividend -- is located. I will get back to why this rule violates all common sense of escheatment law. First I want to discuss the extraordinary way in which this new rule would be applied under H.R. 2443.

H.R. 2443 would apply this brand new rule of escheat retroactively and does not even specify a limit to the reach-back period. That means that any owner-unknown dividend or interest payment that my State or your State has ever escheated in full compliance with applicable law is being seized and redistributed to other States by an Act of Congress. Focus on that point: Revenue that your State took in lawfully years ago is repossessed by Congress and given to another State.

If that concept makes you uneasy -- and it should -- it gets worse. The revenues H.R. 2443 aims to redistribute are not locked in an "escheat vault" for safe-keeping. They have been appropriated with other lawful revenues and spent on schools, bridges, highways, health care, and public parks for the citizens of the escheating States. So now the theme of H.R. 2443 becomes: Revenue that your State took in lawfully years ago and spent for public purposes is repossessed by Congress and given to another State.

One reason these consequences of H.R. 2443 should leave you, as a body governed by the Law, uneasy is that this bill is unquestionably unconstitutional. First, no enumerated power in Article I of the Constitution permits the Congress of the United States to redistribute property of individual States on grounds of "equity." Civics 101 taught us that the United States is a federation of sovereign States, each with control of its own government and treasury. The States are held together in a union precisely because our Constitution protects their sovereignty and prevents a gang of 47 from enacting laws to seize the lawful property of three. Were fiscal invasions of this sort allowed, the States would all have standing armies!

The "Takings Clause" of the Fifth Amendment reaffirms this message. As you know, the federal government cannot confiscate private property without providing just compensation. That clause applies equally to the property of States, and reinforces the unconstitutionality of H.R. 2443.

To make the point a different way, imagine the implications if H.R. 2443 were constitutional. All Congress would need is a majority of votes and an argument of "equity" to dip into State treasuries anywhere and transfer those funds to other States. I can think of plenty of arguments that would be appealing to a majority of this body. Why is it fair that California has collected so much revenue from the entertainment industry? The revenues "originated" in the home states of cinema-goers everywhere, so let's spread it around! Why should Texas be permitted to escheat unclaimed mineral proceeds just because they are held by entities in Texas? The investments were owned by people all over the country. Why not spread the unclaimed mineral proceeds among all the States?

In short, the retroactivity clause of H.R. 2443 violates state sovereignty and the United States Constitution. The Supreme Court could not let such a precedent stand.

Prospectively, as I mentioned before, H.R. 2443 contradicts all common sense behind escheatment law by directing owner-unknown dividends and interest payments to the state of the principal executive office of the issuer of the stock or bond on which the distribution was paid. The issuer, however, has no connection whatsoever to the money we are talking about. To understand this point, it is important to remember why interest and dividends of this type are paid in the first place -- it is because the money is owed to others. When I buy a municipal bond, for instance, I am lending the use of my money to the municipality issuing the bond. The interest paid is owed to me as compensation for giving up my money for the period of the bond.

When these distributions become owner-unknown, it is because a break-down has occurred in communications between financial intermediaries like banks and brokers who hold stocks and bonds for their customers. In most cases, the customer receives the interest or dividend from the intermediary holding the customer's security. The intermediary, however, can get shortchanged when the issuer or its paying agent sends the distribution to a broker or bank that no longer holds the security.

At the end of the day, then, what State should escheat this lost distribution? H.R. 2443 points to the State of the issuer's principal executive office. But the issuer, as I discussed, is the entity that owed the money to begin with. Someone was shortchanged in the course of this transaction, but the one party that we <u>know</u> was <u>not</u> is the issuer, and there is no reason for the Congress to give a windfall to the issuer's State. By escheating the owner-unknown distribution to the incorporating State of the broker or bank holding the funds, the current and longstanding rules remit the money to the State that supports the brokers and banks of the financial services industry, which is the ultimate bearer of the cost of these securities transactions.

*   *   *

In conclusion, I urge you to resist the temptation to sacrifice sound constitutional and policymaking principles for the false promises of financial gain that have been laid before you as inducement to pass H.R. 2443. As Congressman Schumer emphasized, the financial benefits of this bill for any State have been wildly exaggerated. And, as I hope I have made clear, this bill is unconstitutional and simply bad policy.

COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE N W
P O BOX 7566
WASHINGTON, D C 20044-7566
(202) 662-6000

TELEFAX (202) 662 6291
TELEX 89-593 (COVLING WSH)
CABLE COVLING

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE 071-495-5655
TELEFAX 071-495-3101

BRUSSELS CORRESPONDENT OFFICE
44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE 32-2 512-9890
TELEFAX 32-2-502 1598

CHARLES A. MILLER
DIRECT DIAL NUMBER
(202) 662-5410

March 21, 1994

BY FACSIMILE

Yeoryios C. Apallas, Esq.
Deputy Attorney General
Department of Justice
455 Golden Gate Avenue
San Francisco, California 94102

Dear Mr. Apallas:

I was distressed to receive a copy of your letter of March 18, 1994, to Dennis Lyons, written on behalf of Messrs. Nash, Flug and Mattax as well as yourself, which continues to attack New York and Delaware for refusing to negotiate with the other states on the escheatment issue. Your letter states that "New York and Delaware repeatedly and steadfastly have refused to respond" to proposals that the other states have advanced, and that we have "failed to make a substantive counter-proposal" to your letter offer of February 16, 1994. These statements are repetitions of themes that representatives of the intervenor states are attempting to spread, in the Congress and elsewhere, apparently to support your pleas that Congress move forward with your proposed legislation. Recent examples include a memorandum dated February 28, 1994, on behalf of all the intervenors, and a letter dated March 1, 1994, on behalf of the treasurers of intervenor states, both generated in Mr. Nash's office, both distributed among Congressional offices, and both stating that New York and Delaware have refused to make any settlement proposal to the intervenors.

Mr. Nash knows these statements to be false, and I would be surprised if you and the other counsel for the intervenors did not know that as well. Mr. Lyons and I agreed to meet "off the record" with Mr. Nash, at his request, on February 25 in an effort to advance the settlement process, and at that time we set forth a basis for settlement, with dollar amounts, that our client states were prepared to offer. We did this at Mr. Nash's urging, allegedly because it would assist him in resolving the confidentiality issue. I have refrained from making reference to this proposal to anyone because I thought that by doing so I would be breaching the understanding on which the meeting was predicated. I now realize that the confidence I have been respecting concerning that meeting is being deliberately abused in an effort to paint New York and Delaware in an unfavorable light. As much as I find it distasteful to speak of something I agreed to keep private, I will not remain silent when those to whom I pledged confidence have taken advantage of that pledge to spread false reports.

The decision to refer to the February 24 meeting is entirely my own. Mr. Lyons is out of town for several days and is unaware of my response to your letter.

There was another "off the record" meeting with your side. On Tuesday, March 1, Mr. Lyons and I met with Mr. Nash and Mr. Mattax, who informed us that you and Mr. Flug were aware of the meeting. While no substantive terms were discussed at that meeting, we discussed further how we might resolve the confidentiality issue so that negotiations could proceed. Mr. Nash and Mr. Mattax undertook at the end of the meeting to respond to us after considering several options that had been discussed. To date, neither Mr. Lyons nor I have heard from either of them. I presume you received a report of that meeting.

When we agreed to these "off the record" meetings, we did not think that they would be followed by repeated public assertions that we have refused to meet, refused to respond, and refused to make counter-proposals. These assertions are not consistent with the claim that you are seeking to negotiate in good faith.

Let me also speak to the question of confidentiality, which you now state you are prepared to embrace as a basis for settlement discussions. When we met on February 10, 1994, we had an extended discussion on that issue. I need not rehearse it. Suffice it to say that agreement was not reached on how discussions might be held on a confidential basis. However, we did go forward, I believe at your request, to lay out a basis for approaching settlement discussions after very specific assurances by all present that the content of that discussion would be kept confidential and, in particular, would not be disclosed to members of Congress or their staffs. I accepted those assurances at face value. For that reason, it was both a surprise and a disappointment to learn that the statements I made at that meeting were being used with Congressional members and staff as part of the campaign to demean New York and Delaware in order to advance the escheatment legislation. In addition to several oral reports, a letter from Governor Richards of Texas to Governors Cuomo and Carper dated February 22, 1994, a copy of which was sent to Congressman Neal, contains such references. This violation of the prior assurances of confidentiality, as well as the manner in which your colleagues have taken advantage of our willingness to meet "off the record," causes me to have serious doubts about the value of the offer of confidentiality contained in your most recent letter.

New York is prepared to engage in real, honest, legitimate negotiations for a realistic settlement of the outstanding issues. We are not prepared to be stampeded or to be used simply to advance the intervenors' legislative strategy. Your notion of a marathon labor-like negotiating process is not a realistic means of negotiating a settlement. You well know the process for decision-making in state governments, and the time that is required to secure agreement on important policy matters, with both executive and legislative branches of government.

We continue to await a response from Messrs. Nash and Mattax on the issues discussed at our last meeting. When we have reached an understanding on how negotiations will proceed on a confidential basis, and when we are reasonably assured that the promises of confidentiality will be respected, we are prepared to meet with you and try to resolve the issues.

Sincerely,

Charles A. Miller

mb

cc: Bernard Nash, Esq.
David C. Mattax, Esq.
James F. Flug, Esq.
Dennis G. Lyons, Esq.

NEW YORK, NEW YORK

DENVER, COLORADO

ARNOLD & PORTER
1200 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036-6885
(202) 872-6700
CABLE: ARFOPO
FACSIMILE: (202) 872-6720
TELEX: 89-2733

LOS ANGELES, CALIFORNIA

TOKYO, JAPAN

DENNIS G. LYONS
DIRECT LINE: (202) 872-6865
FACSIMILE: (202) 728-2130

February 25, 1994

VIA FAX

Bernard Nash, Esq.
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

James F. Flug, Esq.
Lobel, Novins, Lamont & Flug
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005

David C. Mattax, Esq.
Assistant Attorney General
State of Texas
William P. Clements Building
300 West 15th Street
Austin, Texas 78701

Yeoryios Apallas, Esq.
Deputy Attorney General
State of California
Department of Justice
455 Golden Gate Avenue
Room 6200
San Francisco, California 94102

Re: *Delaware v. New York, No. 111 Original*

Gentlemen:

This is in response to your letter of February 16, 1994. Mr. Miller's response of this date is written on behalf of Delaware as well as New York. My purpose in writing is to supplement his response with regard to some matters antecedent to Mr. Miller's involvement in this case.

Your letter sets forth an erroneous version of the history of negotiations. It is not the case that "the 47 Intervenor States and the District of Columbia have made multiple substantive settlement proposals to New York and Delaware" as the letter asserts. There were two large conference room meetings, one in May and one in June 1993, at which the Intervenors talked about the framework for settlement as they viewed it (some money from pot A, some money from pot B, legislation of a certain nature, etc.) but no definite numbers were ever put on the table. Indeed, the first definite, with numbers, proposal put forward by the "47 Intervenors and the District of Columbia" was that in your letter of February 16, 1994. (Today's letter from Mr. Miller constitutes our joint reply to that proposal.)

ARNOLD & PORTER
February 25, 1994
Page 2

As was made plain last Summer to the representative of the largest number of the Intervenors, for his client's benefit and those of the others, Delaware and New York were not going to be in a position to make a proposal to the Intervenors until they had settled their disputes among themselves. The negotiations necessary to achieve this were long and arduous, but a settlement between New York and Delaware was reached on January 21, 1994. The day that it was executed, New York and Delaware indicated their desire to conduct settlement discussions with your clients. The first meeting to try to set up conditions for a fruitful dialog between the parties was not scheduled until February 10, 1994, due to the Intervenors' insistence on negotiating as a body and the scheduling problems which that entailed, but the discussion then went forward.

We certainly want to continue the discussions, although we do not propose to continue them except on appropriate undertakings of confidentiality, for the reasons stated in Mr. Miller's letter. If you are willing to talk on a conventional settlement basis -- with proposals held confidential and not used to attempt to disadvantage the negotiating adversary in other forums -- we will be glad to go forward with substantive discussions.

I look forward to hearing from you.

Sincerely yours,

Dennis G. Lyons

cc: Charles A. Miller, Esq.

bcc: Hon. Charles M. Oberly, III
Leo E. Strine, Jr., Esq.
J. Patrick Hurley, Jr., Esq.
Ms. Elizabeth P. Ryan

STATE OF DELAWARE
OFFICE OF THE GOVERNOR

THOMAS R. CARPER
GOVERNOR

March 4, 1994

The Honorable Ann W. Richards
Governor of Texas
Office of the Governor
Austin, Texas 78711

Dear Governor ~~Richards~~: Ann

I am in receipt of your letter to me and Governors Cuomo and Weld of February 22, 1994. I must say that your letter contains a rather one-sided presentation of the ec[illegible]es of the issue: you should be aware of a number of considerations that point up the gross unfairness of the legislation you are supporting.

First, the property at issue is not made up of funds that rightfully belong to individuals scattered throughout the nation; instead, they are almost entirely funds owed by financial institutions to other financial institutions, which are highly concentrated in the financial-center states. It should therefore come as no surprise that the financial-center states collect a greater proportion of this kind of unclaimed property, for the debtors and creditors are located and incorporated in them.

Second, the sum total of unclaimed property is spread quite evenly among all fifty states under the Supreme Court's rules. The unclaimed securities distributions at issue here are only a fraction and a small specialized part of that much larger total. It would be easy to find escheats in a narrow, specialized category that tend to be concentrated in other groups of states -- oil and gas royalties, for example; many of these pass under the "primary rule" to the oil

LEGISLATIVE HALL
DOVER, DE 19901
302/739-4101
FAX 302/739-2775

CARVEL STATE OFFICE BLDG.
WILMINGTON, DE 19801
302/577-3210
FAX 302/577-3118

The Honorable Ann W. Richards
Page Two
March 4, 1994

and gas producing states but what creates much of the value is the demand in the oil and gas consuming states. If particular segments of the escheat universe are concentrated on and the whole of it ignored, many instances that could be narrowly criticized as "inequities" can be found, but overall the whole scheme, under the Court's rules, does work well.

Third, and perhaps most important, you seem to think that the financial-center states are reaping some kind of unfair benefit. But every state gains from one or another benefit that it confers on the rest of our nation. Delaware does not have an "oil patch" as Texas does; it does not have vast expanses of rich soil from which spring valuable crops; and it does not have a Hollywood or a Silicon Valley; it provides a market for these goods and services, more than a source. But it does have a dedicated group of public servants (and people in the private sector) who have striven for generations to make Delaware's corporation law the nation's best corporation law and its courts fair courts for the progressive administration of that law. Why single out Delaware's unique human resources instead of, say, the oil and gas giving rise to substantial severance taxes collected by Texas and paid, ultimately, by consumers across the nation? It also seems particularly unfair that you have asked Congress to redistribute moneys lawfully taken and spent by the States which are the bill's victims; surely that request has pitted State against State in an unseemly way and has opened the door to other so-called "equitable" legislation along the same lines. No state is immune from being singled out, and any state could be next.

Finally, although the proposed legislation has been promoted as a means to enrich 47 states at the expense of the other three, the financial impact of the proposed legislation on each of the 47 is far from clear: it appears from studies performed by my staff that other states with large banks located within their borders will suffer a net loss of escheat revenues. As far as I am aware, no serious and comprehensive study of the losses expected by each state (on the basis of hard data) has taken place at either the state or federal level, except by New York, which did so as part of court-ordered discovery.

The Honorable Ann W. Richards
Page Three
March 4, 1994

Although I am heartened to learn that you, too, wish to see a settlement of this litigation, I am particularly disappointed that you consider our negotiators' request to maintain the confidentiality of the substance of the discussions to be a "tactic not designed to resolve the matter." In that regard, I have to say that you are simply wrong -- and I find it particularly troubling that you would question the good faith of your sister states in negotiating.

Confidential negotiations are the norm, not the exception. Confidentiality was respected in the negotiations between Delaware and New York, which led to an amicable settlement embraced by both sides. Indeed, the development of mutual confidence and a willingness to compromise is, in my judgment, not possible if every position taken might be reported to the world as a purported concession or a sign of weakness. This principle is so well established that, in many contexts (such as litigation), disclosure or other use of the substance of what is offered in settlement negotiations is flatly prohibited. In commerce and in diplomacy, confidential negotiations are considered appropriate, and negotiators regularly decline to comment on the substance of negotiations that have not been concluded.

As I said, I am particularly pleased to learn that you, too, wish to see a settlement of this litigation. Delaware and New York have set forth a structure for settlement designed to provide a mutually advantageous resolution of the litigation for all states. I have instructed my staff and our negotiators to continue to pursue a negotiated settlement of this matter. I am confident that they shall do so in good faith.

Sincerely,

Thomas R. Carper

cc: The Honorable Mario M. Cuomo
The Honorable William F. Weld
The Honorable Stephen Neal

ARNOLD & PORTER
1200 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036-6885
(202) 872-6700
CABLE: "ARFOPO"
FACSIMILE: (202) 872-6720
TELEX: 89-2733

NEW YORK, NEW YORK
DENVER, COLORADO

LOS ANGELES, CALIFORNIA
TOKYO, JAPAN

DENNIS G. LYONS
DIRECT LINE (202) 872-6888
FACSIMILE (202) 728-2130

March 18, 1994

VIA FAX

Bernard Nash, Esq.
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

James F. Flug, Esq.
Lobel, Novins, Lamont & Flug
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005

David C. Mattax, Esq.
Assistant Attorney General
State of Texas
William P. Clements Building
300 West 15th Street
Austin, Texas 78701

Yeoryios Apallas, Esq.
Deputy Attorney General
State of California
Department of Justice
455 Golden Gate Avenue
Room 6200
San Francisco, California 94102

Re: *Delaware v. New York, No. 111 Original*

Gentlemen:

This is in further reference to your letter of February 16, 1994, to me, and my response to it of February 25, 1994.

In your letter of February 16, 1994, you said that you were "writing for the purpose of again engaging New York and Delaware in substantive settlement negotiations aimed at resolving the dispute over States' entitlement to unclaimed securities distributions."

In my response to your letter, I observed that New York and Delaware indicated on January 21, 1994, that they were prepared to enter into settlement discussions with your clients, and that a meeting to try and set up conditions for a fruitful dialog between the parties took place on February 10, 1994.

That exchange of correspondence between us reflected some disagreement as to what had transpired in 1993. It contained, on your part, a public extension of a settlement proposal which was completely "out of the ballpark" as far as Delaware and New York were concerned -- that those states pay a quarter of a billion dollars for the privilege of supporting the legislation which you have drafted and proposed. I can't imagine that any such proposal would have been expressed in a private, confidential negotiating session. Delaware and New York, of course, rejected it.

Yet notwithstanding this, my letter closed with an assurance to you, on behalf of Delaware, that "we certainly want to continue the discussions" begun on February 10, 1994, and that "[i]f you are willing to talk on a conventional settlement basis -- with proposals held confidential and not used to attempt to disadvantage the negotiating adversary in other forums -- we will be glad to go forward with substantive discussions."

On behalf of his client, and expressing Delaware's views, Charles Miller, New York's counsel, also wrote you on the same day expressing a similar position, namely that "New York and Delaware are willing to attempt settlement through good faith negotiations," and that "we stand ready and willing to work with you to resolve the issues."

I note also that on March 4, 1994, in response to a letter from Governor Ann Richards of Texas, Governor Carper of Delaware wrote Governor Richards expressing Delaware's desire to work in good faith toward a consensual settlement of the issues that had been raised.

My letter to you closed: "I look forward to hearing from you." Since then, I have not had any word as to whether you wish to continue substantive settlement discussions on a confidential basis or whether you are unwilling to.

If you are willing to continue the discussions on a confidential basis, I would appreciate your telling me so. As we have made plain to you, such an indication of willingness to negotiate in good faith need not be accompanied by any commitment on your part not to press the legislation during the negotiations; your clients would be free to press the legislation and my client and Mr. Miller's client would be free to oppose it.

If on the other hand you have determined that you are not prepared to continue negotiations, I would appreciate the courtesy of your telling me that. However, I would hope that that would not be your position, since it strikes me that this is a matter on which we as counselors owe our clients the duty of attempting to reach an amicable resolution if at all possible.

I still look forward to hearing from you.

Sincerely yours,

Dennis G. Lyons

cc: Charles A. Miller, Esq.

bcc: Hon. Charles M. Oberly, III
Leo E. Strine, Jr., Esq.
J. Patrick Hurley, Jr., Esq.
Ms. Elizabeth P. Ryan

ARNOLD & PORTER

1200 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036-6885
(202) 872-6700

1700 LINCOLN STREET
DENVER, COLORADO 80203-4540
(303) 863-1000

399 PARK AVENUE
NEW YORK, NEW YORK 10022-4690
(212) 715-1000
FACSIMILE (212) 715-1399

355 SOUTH GRAND AVENUE
FORTY-FOURTH FLOOR
LOS ANGELES, CALIFORNIA 90071-3106
(213) 617-4300

KIOICHO O BUILDING
3-28, KIOICHO, CHIYODA-KU
TOKYO 102 JAPAN
011 (813) 3221-3690

KENT A. YALOWITZ
DIRECT LINE (212) 715-1113

March 21, 1994

BY FAX

Yeoryios C. Apallas, Esq.
Deputy Attorney General
State of California
455 Golden Gate Avenue, Room 6200
San Francisco, California 94102

Re: *Delaware* v. *New York*, U.S. Supreme Court, No. 111 Original

Dear Yeoryios:

This is in response to your letter of Friday, March 18, 1994, to Dennis Lyons. As you knew before you sent the letter (which was received several hours after the close of business and seen by me only this morning), Dennis is out of the country. He will not be back until Monday, March 28.

While we are pleased to hear that you and the other Intervening States wish to continue our discussions on a confidential basis, we are not pleased by your effort to set unilateral dates and terms that you know cannot be abided because of the scheduling conflicts of others. Delaware is available to meet on Tuesday, March 29, after Dennis' return, or as soon thereafter as all other parties can meet.

Best regards,

Very truly yours,

Kent A. Yalowitz

cc: Charles A. Miller, Esq.

TESTIMONY OF THE HONORABLE JOHN J. GIBBONS,
RICHARD J. HUGHES PROFESSOR OF CONSTITUTIONAL LAW,
SETON HALL UNIVERSITY LAW SCHOOL,
BEFORE THE FINANCIAL INSTITUTIONS SUPERVISION,
REGULATION, AND DEPOSIT INSURANCE SUBCOMMITTEE
OF THE HOUSE BANKING COMMITTEE
CONCERNING H.R. 2443,
THE EQUITABLE ESCHEATMENT ACT OF 1993

MARCH 22, 1994

Mr. Chairman and members of the Committee, thank you for the opportunity to testify with respect to the constitutional infirmities of H.R. 2443, the proposed Equitable Escheatment Act of 1993. As I will explain in my testimony today, my examination of the authorities and my experience as a federal judge and as a student and teacher of constitutional law leads me to conclude unequivocally that H.R. 2443 is plainly and incurably unconstitutional.

In the twenty years that I was on the Court of Appeals for the Third Circuit, in the twenty years that I practiced law before my appointment to that court, and in the many years since 1952 during which I have labored as a law teacher, I have not come across a proposed statute that raises as many constitutional problems as this bill does. The bill, if enacted, would:

-- violate principles of separation of powers by including a retroactivity provision that attempts to reverse a conclusive determination of the Supreme Court;

-- purport to authorize the States to violate the Due Process Clause by asserting sovereignty over persons with whom the States have insufficient contacts;

-- violate principles of federalism by attempting to invade a core aspect of state sovereignty and by purporting to regulate sovereignty; and

-- endorse and tolerate a fundamental breakdown in the political process, because of the apparent existence of a set of undisclosed side-deals among some states to redistribute the proceeds of the legislation in violation of the Interstate Compact Clause and in contravention of the safeguards of the federal political structure.

I will address these problems in turn for the Committee.

I.

The Retroactive Application of H.R. 2443 Violates Separation of Powers Principles

The retroactive application of H.R. 2443 would reverse the decision of the United States Supreme Court in Delaware v. New York, 113 S. Ct. 1550 (1993). That decision concluded that New York had properly escheated certain property, but that Delaware, rather than New York, was entitled to escheat certain other property that New York had escheated. The proposed legislation would reverse the Court's ruling. Thus, Congress would, if it passed H.R. 2443, be exercising appellate jurisdiction over a Supreme Court decision that is otherwise unreviewable. Such an exercise by Congress of judicial powers would be a violation of constitutionally mandated principles of separation of powers.

The Supreme Court has exclusive original jurisdiction over suits between the states, with no provision for appellate review in such suits. Article III, § 2, Cl. 2. Moreover, while Article III, § 2, Cl. 2 provides for Congressional control over the Supreme Court's appellate jurisdiction, there is no Congressional power to modify that Court's original jurisdiction. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-80 (1803). It is universally agreed that the Constitution requires, at the barest minimum, one Supreme Court exercising at least the original jurisdiction specified in Article III. See generally Paul M. Bator, et al., Hart & Wechsler's The Federal Courts and The Federal System 295 (3d ed. 1988).

The provision in Article III for original jurisdiction in suits between the states clearly was intended by the Framers to provide that in the newly created federal union a judicial tribunal would be available to resolve, with finality by judicial action, disputes, such as ownership of property, which were amenable to such resolution. In 1775, the Continental Congress confronted the spectacle of actual fighting between Pennsylvania and Connecticut over territory on the banks of the Susquehanna River. A special committee of Congress was appointed to recommend the terms of an armistice until the suit could be resolved. Article IX of the Articles of Confederation drafted in 1777 provided for a cumbersome method of resolving similar disputes. That tribunal eventually decided in favor of Pennsylvania's claim. But most state boundary disputes remained unresolved at the time of the 1787 Convention. See Carson, The Supreme Court of the United States, 67-68 (1891); Warren, The Supreme Court and Sovereign States 13 (1924). At the Convention, a number of delegates warned of the need for a tribunal which could peacefully resolve such disputes. E.g., Randolph, 1 Max Farrand The Records of the Federal Convention (1937 Rev. Ed), 19, 26 (May 29); Gerry, 1 Farrand 515 (July 2); Blair Plan, 2 Farrand 432 (Aug. 2); Hamilton Plan, 2 Farrand 292 (June 18). After careful consideration, it was resolved that the Supreme Court should be given original jurisdiction to resolve all disputes between states. 2 Farrand 400-01 (August 24).

Disputes over sovereign power to escheat property are a paradigm of the kind of disputes that the Framers contemplated would be resolved by the Supreme Court. Indeed, only two years ago, the Supreme Court reconfirmed in New York v. United States, 112 S. Ct. 2408, 2430-31 (1992), that the Court, rather than Congress, is the proper forum for the resolution of disputes over the disposition of limited resources to which more than one state has a claim.

It is clear that when the Supreme Court entertains a suit between states, it is acting judicially. An essential aspect of judicial action is finality. Thus the Supreme Court has always refused to entertain proceedings in which its decision would be subject to revision by another branch of the government. <u>Hayburn's Case</u>, 2 U.S. (2 Dallas) 409, 410 n.2 (1792); <u>Gordon v. United States</u>, 117 U.S. (2 Wallace 561) 697, 699-706, (1865); <u>United States v. Jones</u>, 119 U.S. 477, 478-79 (1886); <u>District of Columbia v. Eslin</u>, 183 U.S. 62, 64-66 (1901); <u>see</u> <u>Glidden Co. v. Zadnock</u>, 370 U.S. 530, 568-71 (1962). Such refusals have occurred in instances in which Congress has attempted to confer on the Court the duty to render decisions which would be subject to revision, and the appropriate remedy obviously was that which the Court applied; namely, refusing to entertain the action.

Such a remedy, however, would not be appropriate for cases within the constitutionally mandated original jurisdiction of the Supreme Court. The duty to entertain such suits arises not on the authority of any Congressional enactment, but directly under the Constitution. Thus, in the face of action by Congress purporting to exercise a revisionary authority over decisions in such suits, the Court would not -- indeed could not -- withdraw from entertaining them, but would instead disregard the attempted revisions and take appropriate judicial action to enforce the decision without modification. Any other action would have the effect either of permitting Congress to contract the Supreme Court's original jurisdiction by forcing the Court to refuse to entertain suits subject to revision, or of subjecting final decisions of that Court to revision by another branch. Either course is unquestionably unconstitutional.

The proposed retroactivity provision, then, is an inappropriate effort by Congress to exercise judicial power constitutionally committed to another branch. In that respect, it falls squarely within the reasoning of recent cases rejecting efforts by Congress to exercise powers committed by the Constitution to the other branches. In every recent instance in which Congress has attempted such aggrandizement, the Supreme Court has held the Congressional action to be unconstitutional.

In INS v. Chadha, 462 U.S. 919 (1983), for example, the Court considered the provision in the Immigration and Nationality Act of 1952 that provided for a one-house veto over a decision by the Attorney General to suspend deportation of a deportable alien. Faced with such a suspension by the House of Representatives, the Court, in a case of doubtful justiciability, went out of its way to announce the unconstitutionality of efforts by Congress to aggrandize its authority at the expense of another branch of government. Chief Justice Berger reasoned that the one-house veto was an invasion of the powers of the President in the legislative process. 462 U.S. at 957-59. Justice Powell reasoned that by exercising a revisionary authority over the Attorney General's decision, Congress was attempting to act judicially. 462 U.S. at 964-67 (concurring opinion). Eight justices agreed that Congress could not assume a function that the Constitution entrusted to another branch. Yet H.R.

2443 would do exactly that. If enacted it would be an unconstitutional exercise of appellate jurisdiction over the Supreme Court's decision in Delaware v. New York.

In Bowsher v. Synar, 478 U.S. 717 (1986), the Court considered certain provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 (The Gramm-Rudman-Hollings Act), which authorized the Comptroller General, a legislative branch official, to specify budget reductions. Once again, seven justices struck down that effort by the legislative branch to aggrandize its own authority at the expense of the executive branch.

More recently, in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298 (1991), the Court considered a provision in the Metropolitan Washington Airports Act of 1986 that purported to reserve for members of certain House and Senate Committees and one member from the House and Senate as a whole a veto over regulations of the state agency to which the airports had been transferred. As in Chadha and Bowsher, the effort by Congress to aggrandize its powers by maintaining ongoing control over the use to which property transferred to a state might be put was struck down on separation of powers grounds.

The extent of the Court's resistance to Congressional efforts to interfere with the judicial function is confirmed, if confirmation on that score is at all necessary, by its decision in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2142-46 (1992), holding unconstitutional the citizen suit provision of the Endangered Species Act, Pub. L. No. 93-205, § 11, 87 Stat. 900 (1973) (current version at 16 U.S.C. § 1540(g) (1988)).

In each instance, therefore, in which Congress has undertaken to exercise powers textually committed to another branch, the Court has held that the action in question was an unconstitutional violation of principles of separation of powers. See U.S. v. Franks, 864 F.2d 992, 1013 (3d Cir. 1988); Eugene Gressman, Separation of Powers: The Third Circuit Dimension, 19 Seton Hall L. Rev. 491, 508 (1989).

Compared to the Congressional actions in Chadha, Bowsher, and Washington Airports Authority, the action proposed in H.R. 2443 is an a fortiori case. It is a raw exercise of judicial power; an attempt to exercise appellate jurisdiction over a decision by the Supreme Court in a suit in which, under the express provisions of Article III of the Constitution, the decision is not subject to appellate review anywhere. Even critics of the Supreme Court's separation of powers jurisprudence urge that it is completely justified when applied to the protection of the core Article III function of finality in adjudication. See Jesse H. Choper, Judicial Review and the National Political Process, 382-85 (1980); John J. Gibbons, The Court's Role in Interbranch Disputes Over Oversight of Agency Rulemaking, 14 Cardozo L.

Rev. 957, 961-68 (1993). Clearly the Congressional assumption of appellate jurisdiction over the Court's original jurisdiction decisions fails this constitutional standard. The outcome cannot be doubted.

II.

Even Prospectively Applied, H.R. 2443 Is Constitutionally Infirm

Mr. Chairman, I have thus far addressed only the retroactive reopening of a Supreme Court final decision by requiring states like New York and Delaware to disgorge to sister states sums to which that decision held they were entitled. The prospective operation of H.R. 2443 presents a somewhat different set of issues, for it must be conceded that the prospective operation of a non-Constitutional rule of law announced in a decision of an Article III Court can, without violating principles of separation of powers, be changed by Congress. E.g., Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), upholding a statute overruling United States v. South Eastern Underwriters Ass'n, 322 U.S. 533 (1944).[1] While prospective application of H.R. 2443 might

[1] Moreover, even parties to the lawsuit resulting in a final decision may be able to rely on the new rule of non-constitutional federal law announced by Congress in order to obtain, prospectively, relief from a final judgment as to how its property can be used on a going-forward basis. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431-32 (U.S. 1855). And in cases in which an issue of non-constitutional federal law is sub judice, and there is no final decision, Congress can, without violating principles of separation of powers, instruct Article III courts about the law on such an issue. Robertson v. Seattle

not violate principles of separation of powers, it still must satisfy other constitutional limitations. It does not. Rather, even prospectively applied, H.R. 2443 violates several rules of constitutional law.

Audubon Society, 112 S. Ct. 1407, 1412-14 (1992). Thus we may suppose that Congress could change by statute, prospectively, without violating principles of separation of powers, the rules of accretion and avulsion which the Court has announced for determining state sovereignty over real property. Retrospectively, however, Congress could not change by statute property interests which have become vested by virtue of a final decision of the Court.

Note that in the instances in which the Article III courts have approved a prospective change by Congress of a rule of law announced in a decision, the changed rule has always been one of non-constitutional law. No constitutional law issue was presented by a post-judgment statute validating issuance of District of Columbia Bonds, Hodges v. Snyder, 261 U.S. 600, 603-04 (1923), or waiving the benefit of a judgment in favor of the United States, Cherokee Nation v. United States, 270 U.S. 476, 486 (1926), or waiving on behalf of the United States the defenses of res judicata or collateral estoppel, United States v. Sioux Nation of Indians, 448 U.S. 371, 396-97, 407 (1980). Thus Congress, with plenary legislative authority under the Commerce Clause, could authorize the erection of a low bridge over the Ohio River even though the Supreme Court thought that the dormant Commerce Clause case law (a variety of federal common non-constitutional law) required a high bridge. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) at 431-32. Congress has no power, however, to enact legislation violating (e.g. Ex Parte Garland, 71 U.S. (4 Wall.) 333, 377-78 (1866)) or authorizing the states to violate the Constitution. E.g., Mississippi University for Women v. Hogan, 458 U.S. 718, 732-33 (1982); Shapiro v. Thompson, 394 U.S. 618, 641 (1969); Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

A

H.R. 2443 Would, if Enacted, Unconstitutionally Authorize a Violation of the Due Process Clause

First, H.R. 2443 would violate the settled constitutional rule that the Due Process Clause of the Fourteenth Amendment places strict limits upon attempts by the states to exercise sovereignty with respect to persons, property, or issues in which they have no interest.

The most familiar of these limits is the rule that a state court may not exercise adjudicatory jurisdiction over persons having insufficient contacts with that state. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Even if intangible personal property may technically be said, as a matter of state law, to have a "situs" in the forum state, that state may not constitutionally use that intangible situs as a basis for adjudicating claims against parties who have insufficient contacts with it. If, for example, a state were to assert by statute that the ownership of stock in one of its domestic corporations gave it adjudicatory authority over an out-of-state stockholder, the effort would fail. Shaffer v. Heitner, 433 U.S. 186, 213-17 (1977). The reason for the requirement of "minimum contacts" between a State and person over whom it seeks to assert jurisdiction is clear. It is "to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

The question suggested by H.R. 2443 is whether Congress could by statute authorize the states to do what the Due Process Clause forbids. The answer is "no". Congress has authority under Section 5 of the Fourteenth Amendment to legislate to enforce that Amendment, and it may arguably legislate greater due process rights than the Supreme Court has required. It may not, however, in the guise of Section 5 legislation, mandate a lower due process standard than the Court has held to be required. E.g., Mississippi University for Women v. Hogan, 458 U.S. at 732-33; Shapiro v. Thompson, 394 U.S. 618, 641 (1969); Katzenbach v. Morgan, 384 U.S. at 651 n.10. Thus Congress could not authorize the courts of a state to exercise adjudicatory authority in cases in which as a sovereign the State had no legitimate interest.

The due process limits of state sovereignty are not, however, confined to the power to adjudicate. There are, as well, due process limits upon the sovereign power to tax. That power is "one of the primary indicia of sovereignty." Illinois v. Kentucky, 111 S. Ct. 1877, 1882 (1991). This primary indicuim of sovereignty, like the power to adjudicate, is limited by the Due Process Clause. See McHugh & Reed, The Due Process Clause and the Commerce Clause: Two New and Easy Tests for Nexus in Tax Cases, 90 W. Va. L. Rev. 31 (1987). For instance, the interests of parties subject to

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taxation require that limits be placed upon state sovereignty to prevent the imposition of multiple and conflicting burdens. A state with no nexus to the person or transaction subject to the tax, moreover, simply cannot as a matter of due process impose a tax. See, e.g., International Harvester Co. v. Department of Treasury, 322 U.S. 340, 348 (1944); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938). Although the jurisdiction to tax cases requiring a sufficient nexus to the taxing state are usually analyzed in commerce clause terms, the nexus requirement has a due process foundation as well. Thus I hope we would all agree that Congress could not, consistent with due process, authorize Delaware to impose real estate taxes on property in Philadelphia, or authorize New York to tax the income of residents of New Jersey or Connecticut who do not work in New York or otherwise have New York income.

Like the power to adjudicate and the power to tax, the power to escheat properties is also an attribute of sovereignty. None of these sovereign powers derive from the United States Constitution, since the states as sovereignties antedate the 1787 Constitution. They are all to some extent, however, protected from federal encroachment by the Tenth Amendment. E.g., New York v. United States, 112 S. Ct. 2408, 2417-19 (1992) (more on the Tenth Amendment infra). All of them, of course, are subject to Fourteenth Amendment due process limits on sovereignty, and Congress has no power to enlarge one state's sovereignty at the expense of another state.

The Supreme Court's first important consideration of the sovereign power to escheat property was Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541 (1948). In upholding the sovereign power of New York to escheat unclaimed life insurance proceeds on policies issued on the lives of New Yorkers by insurance companies incorporated elsewhere, a majority of the Court engaged in a due process analysis. That analysis found a sufficient nexus with New York under traditional due process analysis to justify the exercise of sovereignty. However, the opinion of the Court was flawed, in the view of the three dissenters, by its refusal to consider the sovereign interests of other states not party to the suit.

In its next effort to deal with sovereign power to escheat, a five-four majority of the Court held that the state of incorporation could escheat unclaimed stock certificates and undelivered dividends owing to the unknown owners of those certificates. Standard Oil Co. v. New Jersey, 341 U.S. 428, 442 (1951). The Court again engaged in a traditional due process analysis and again drew dissents because of the majority's failure to recognize the interests of other potentially interested sovereignties.

If both the domicile of the debtor and the domicile of the creditor could escheat, there would be a serious potential for conflict between states that could each claim to have a sufficient due process nexus with the holder of the unclaimed property to support the exercise of escheat power. This conflict itself raised a serious due process problem, for the Court was also of the view that the Due Process Clause protects holders of unclaimed property from multiple liability to the states. Thus, the Court in Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961), recognized the propriety of an escheat of property could not be decided in a case unless the judgment would bind the other interested states. 368 U.S. at 79.

The Supreme Court's recognition of this additional due process limit on sovereign power to escheat inspired several states to file an original action to decide the appropriate rules of priority among those states that had permissible claims on the property. The result was Texas v. New Jersey, 379 U.S. 674 (1965), in which the Court, as a matter of non-constitutional law, decided the rule of priority among the constitutionally permissible alternatives that had been laid out in Moore, Standard Oil and Western Union. Although Congress might, through the exercise of its commerce power, alter the choice among permissible rules (as a byproduct of some other federal purposes), it cannot admit an impermissible rule. It cannot confer the right to exercise sovereign power on states which as a matter of due process lack such power.

The so-called "primary" rule governing escheats is the one approved in Moore -- the state where the creditor had its last-known address has a sufficient contact with the property to permit the exercise of the sovereign power to escheat. The "secondary" rule is the one approved in Standard Oil -- in the absence of a last-known address of the creditor, the state of domicile of the debtor (the holder of the property) also has a sufficient contact with the property.

As the Court explains in Delaware v. New York, "the secondary rule [permitting the debtor's state to escheat when the creditor's last known address cannot be determined] protects interests of the debtor's state as sovereign over the remaining party to the underlying transaction." 113 S. Ct. at 1558. The debtor's state does not have an interest superior to that of the last-known address of the creditor, but clearly it is the only other state having any nexus with the property.

The Court has never approved the alternative proposed in H.R. 2443. Indeed, the Court's opinion in Delaware v. New York, in explaining why it rejected the rule now proposed, warned that "only a state with a clear connection to the creditor or debtor may escheat." 113 S. Ct. at 1559. H.R. 2443 fails that test.

What H.R. 2443 does not purport to do is as significant as what it does purport to do -- the bill does not federalize the underlying law of property. The settled and universally followed state law is that payment of a distribution by a corporation to the holder of record of its securities discharges the debt. In all 50 states and the District of Columbia, after payment the issuer is neither a creditor nor a debtor. See U.C.C. § 8-207(1).[2] H.R. 2443 would not change this rule. Even assuming Congress may have Commerce Clause authority to do so, it certainly would not, for even proposing to federalize the Uniform Commercial Code would produce universal condemnation from both issuers of and traders in securities. If Congress were to federalize all commercial law by changing the basic rule that payment to a record holder discharged the debt of the issuer, such a new rule of law, however unwise or impractical, would arguably create a property interest with which the state of incorporation of the issuer-debtor had a nexus sufficient to satisfy the due process limits on sovereignty. In the absence of such a change, however, the issuer's state of incorporation or principal executive office has no nexus with the property. Thus, there is no constitutional basis for that state's exercise of the sovereign power of escheat, whether or not Congress purports to authorize it.

Undoubtedly, the state officials urging Congress to permit them to make a raid on the treasuries of sister states will point to the reference in the Court's Opinion in

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[2] The relevant statutes are listed in Appendix A.

Delaware v. New York to 12 U.S.C. § 2501-2503 and to the Court's statement that Congress "may reallocate abandoned property among the States without regard to this Court's interstate escheat rules." 113 S. Ct. at 1562. But those comments do not provide the constitutional foundation that H.R. 2443 otherwise lacks. The Court's language simply acknowledged Congress' power to choose among constitutionally permissible alternatives in the course of an exercise of a power otherwise delegated to Congress by the Constitution. It does not mean that every alternative Congress could enact would pass constitutional muster. The Title 12 provisions refer to an instance in which Congress chose a permissible alternative.

In that instance Congress modified the rule announced in Pennsylvania v. New York, 407 U.S. 206 (1972), with respect to escheat of uncashed money orders. Congress provided that, with respect to unknown-address purchasers, the escheat may take place in the state of purchase. That modification was made after Congress made the credible finding that "a substantial majority of such purchasers reside in the States where such instruments are purchased." 12 U.S.C. § 2501(2). The state of residence of the creditor obviously has a nexus with the property. Indeed, under the primary rule in Texas v. New Jersey, it has the preferred nexus. Thus the only due process question posed by 12 U.S.C. § 2501-03 is whether the presumption set forth in § 2501(2) is a reasonable one. Obviously it is. That statute is entirely different from H.R. 2443, because it did not attempt to authorize a sovereign to escheat without a sufficient nexus with the property. Rather it applies a reasonable presumption in order to facilitate escheat by the one state -- the locus of the creditor -- having the clearest such nexus. In contrast, H.R. 2443 would hand the escheat authority to a state with no nexus, and thus would run directly afoul of the Due Process Clause.

B

H.R. 2443 Invades Sovereign Rights

H.R. 2443 also presents serious and dispositive federalism defects. As I explained earlier in my testimony, the power to escheat is, like the power to tax, a core attribute of state sovereignty. H.R. 2443 seeks to bar the exercise of that sovereign power over property -- the debt owed by a depository or broker to an address-unknown creditor -- by states that would otherwise have such power. The proposed statute is closely analogous to a federal statute saying that a state may not impose any real or personal property tax on property located within its territory.

Although the Court has struggled at the margins with whether various attributes of sovereignty should be considered "core" attributes not subject to Congressional encroachment through the exercise of the Commerce Clause, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), or the taxing and spending clause, South Carolina v. Baker, 485 U.S. 505 (1988), Tenth Amendment limits remain. The escheat power, as an exercise of sovereignty, lies at the "core" of the Tenth Amendment, and Congress has a special duty to protect that core.

In addition, the Court has made it clear that it will not tolerate Congressional regulation of the states as states; that is, in their sovereign capacities. For instance, in New York v. United States, 112 S. Ct. 2408 (1992), the Court observed that "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instruction." Id. at 2421. Reviewing the historical background of the drafting of the Constitution, Justice O'Connor found a core of state sovereignty beyond the reach of federal legislation. "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." Id. at 2423. The Court, therefore, held unconstitutional the "take title" provisions of the Low-Level Radioactive Waste Policy Act of 1985, Pub. L. 99-240, 99 Stat. 1842, 42 U.S.C. § 2021(b), et seq.

Just as Congress, exercising its commerce clause powers, could have directly regulated the disposal of radioactive waste, id. at 2419, so, too, could Congress completely federalize the law of securities transactions. It could, for example, lay down a federal rule that issuers of securities remained debtors at all time until the beneficial owners of securities received payment, and that depositories or brokers were mere agents of issuers. That might make a mess, but Congress could do it.

H.R. 2443 does not do this. Instead, it would leave to state law the creation and regulation of such property interests. It would, nevertheless, say to the states that created and regulated the property interests that they could not include, as a limitation on those property interests, the sovereign power to escheat. This is exactly what New York v. United States holds that Congress may not do.

Moreover, if one looks at the question how states having no nexus to the debtor-creditor relationship will enforce their newly created claim to escheat, the constitutional problems rooted in federalism are compounded further.

The holders of unclaimed property who would be affected by H.R. 2443 will face conflicting claims, since the states in which they are incorporated will contend that the statute is unconstitutional. Those states will resort to their own courts to recover funds owed to address-unknown creditors. Those courts, however, will not be able to assert jurisdiction over the states of the issuers' principal executive offices, which will assert claims under their new purported statutory authority. Thus the same dilemma will arise as the Court addressed in Western Union Telegraph Co. v. Pennsylvania, supra; the inability of a court to protect the debtor against a conflicting claim by a distant state.

For states that accept the invitation in H.R. 2443 to enact "principal executive office of the issuer" escheat laws, the problem will be different. Those states, too, will be faced with Due Process Clause limitations upon the adjudicatory authority of their own courts. Thus those courts will not be able to reach the financial institutions or brokers that have insufficient contacts with the jurisdictions in which the principal executive offices of myriad issuers lie. The claim for the escheated property is one arising under the law of the escheating sovereignty. Thus the claim would not be one arising under the laws of the United States within the meaning of 28 U.S.C. § 1331.[3]

If the state of the principal executive office of the issuer resorts to the courts of the debtor's state to enforce its state-law escheat claim, another difficult federalism

[3] To be sure, adding a right of action in federal district court, were Congress to federalize commercial law, would not solve the substantive constitutional problem with H.R. 2443 -- it would only transfer the problem to a different forum. But the fact remains that suits under the statute will not be available to bind all interested states.

issue will arise; namely, the power of Congress to compel one sovereign state to enforce the escheat laws of a sister state. H. R. 2443 is not explicit in this respect, but if it were to be so construed it would be problematical. No state is required to enforce another state's penal laws. Huntington v. Atrill, 146 U.S. 657, 669 (1892); Restatement (Second) of Conflict of Laws § 89 (1967). Moreover, it is an open question whether a state is under constitutional compulsion to enforce the revenue laws of a sister state. Milwaukee County v. M. E. White Co., 296 U.S. 268, 275 (1935).[4] And since the debtor state's courts would be aware that their own sovereign had a superior claim to the funds in question, resistance may be expected. Forcing a sovereign state to open its courts to enforce the escheat laws of another state plainly raises the same Tenth Amendment structural issues that resulted in the holding in New York v. United States, supra, that the statute at issue purported to regulate the states in their sovereign capacities.

To summarize, H.R. 2443, unconstitutional under the due process clause, is also an unconstitutional violation of the Tenth Amendment which embodies limits on Congressional

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[4] Some might assert that Testa v. Katt, 330 U.S. 386 (1947), and Douglas v. New York NH&H RR, 279 U.S. 377 (1929), which concern the duties of state courts to entertain claims made under federal substantive law, are in point. They are not, because they did not involve the duty to enforce penalties, taxes, or escheats arising under a different state's law.

power in the interest of core state sovereignty.

C

H.R. 2443 Would Improperly Endorse a Breakdown in the Political Process and a Violation of the Compact Clause

A very troubling aspect of the effort by those states that are encouraging the enactment of H.R. 2443 is the fact that, as I understand it, a number of them have made undisclosed side agreements to redistribute the monies they may collect as a result of that enactment. That fact, if true, raises two serious constitutional issues. First, it undermines the reasoning relied upon in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), for the Court's deference to Congress on issues of state sovereignty. Second, it violates Article I § 10 cl. 3.

In Garcia, the Court majority, overruling National League of Cities v. Usery, 426 U.S. 833 (1970), asserted that "the principal means chosen by the Framers to ensure the role of the States in the federal system" was the states' ability to participate in the uniquely structured federal political process. 469 U.S. at 550. See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). That reasoning, however, assumes a level playing field in which the respective interests of the states will be openly urged in Congress and openly resolved or reconciled. Secret deals among the states by which some states bargain to profit to their mutual advantage at the expense of other states not parties to those deals destroys that premise. In South Carolina v. Baker, 485 U.S. 505, 513 (1988), the Court expressed its willingness to consider a claim by a state "that it was deprived of [a] right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." Id. at 512-13 (emphasis supplied); see Laurence H. Tribe, American Constitutional Law, § 5-20 at 384 (2d ed. 1988).

Clearly, the coalition of states supporting H.R. 2443 has decided to join in isolating those few states in which depository institutions and brokerage firms are located, and leave them powerless. The side deal, which is reported to involve dividing the spoils not in accordance with the terms of H. R. 2443 but in a way in which states that do not benefit substantially under the legislation can share more substantially in the proceeds, would be, if successful, a severe breakdown in the process of political checks and balances that was so important to the Court majority in Garcia. In light of that breakdown, H.R. 2443 is constitutionally infirm.

The side deal, if its terms are as reported, also violates the prohibition in Art. I § 10 cl. 3 against states entering into interstate compacts without Congressional consent. That prohibition is absolute in terms and has often been said by the Court to mean that it applies to settlement agreements. See, e.g., Dyer v. Sims, 341 U.S. 22, 27 (1951) ("Congressional consent [for settlement] required, as for all compacts"); Nebraska v. Wyoming, 325 U.S. 589, 616 (1945) (referring to settlement "pursuant to the Compact Clause of the federal Constitution"); Colorado v. Kansas, 320 U.S. 383, 392 (1943) (same); Louisiana v. Texas, 176 U.S. 1, 17-18 (1900) (controversies between states may be settled "with the consent of Congress").

Nevertheless, not all interstate agreements require Congressional approval. "The relevant inquiry must be one of impact on our federal structure." United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 (1978). The clause applies to "agreements that are directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." New Hampshire v. Maine, 426 U.S. 363, 369 (1976) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893)).

A side deal designed to ensure support of states that would otherwise have little or no interest in the passage of H.R. 2443 falls squarely within the forbidden zone. It suffers from all of the identified evils forbidden by the Compact Clause. First, it is aimed at thwarting the normal workings of the federal political structure by purchasing the acquiescence and support of states whose economic interests are not well served by H.R. 2443. Second, it is aimed at preventing those states most seriously affected from forming alliances with other states that might otherwise be sympathetic. Third, assuming the United States has sovereign authority to enact H.R. 2443 (but see Points I, II A, B), the side deal is an encroachment on that sovereign authority, since its purpose is to prevent the operation of the law as enacted by Congress -- if it is enacted.

In short, enactment of H.R. 2443 in the shadow of this side deal would represent a breakdown of the national political process of constitutional proportions. Even if the enactment were not the result of the side deal, its existence is a violation of the Compact Clause, because such a breakdown is its intended purpose. Finally, an agreement among the states to act inconsistently with a proposed federal statute is a threat to federal supremacy which falls squarely within the core purposes of Article I § 10 cl. 3. Congress has a constitutional obligation not to sanction such a violation of the Constitution and an attack on the political order. That constitutional obligation mandates rejection of H.R. 2443.

CONCLUSION

Members of Congress have taken the oath prescribed by Article VI cl. 3 to support the Constitution. They have an affirmative duty to refrain from voting for legislation they know to be unconstitutional. H.R. 2443 plainly is such legislation. It would unconstitutionally revise a decision of the Supreme Court. It would unconstitutionally authorize escheat by states with an insufficient nexus to the escheated property in violation of due process. It would violate fundamental principles of federalism in violation of the Tenth Amendment. It would endorse a side deal among a number of states that violates the Compact Clause and that undercuts the political process, which is so vital to the protection of state sovereignty. No right-thinking member of Congress should support this legislation.

Appendix A

STATE STATUTES CODIFYING U.C.C. § 8-207

Ala. Code § 7-8-207
Alaska Stat. § 45.08.207
Ariz. Rev. Stat. Ann. § 47-8207
Ark. Code Ann. § 4-8-207
Cal. Com. Code § 8207
Colo. Rev. Stat. Ann. § 4-8-207
Conn. Gen. Stat. Ann. § 42a-8-207
Del. Code Ann. tit. 6, § 8-207
D.C. Code Ann. § 28:8-207
Fla. Stat. Ann. § 678.207
Ga. Code Ann. § 11-8-207
Haw. Rev. Stat. § 490:8-207
Idaho Code § 28-8-207
Ill. Rev. Stat. ch. 810, act 5, § 8-207
Ind. Code Ann. § 26-1-8-207
Iowa Code Ann. § 554.8207
Kan. Stat. Ann. § 84-8-207
Ky. Rev. Stat. Ann. § 355.8-207
La. Rev. Stat. Ann. tit. 10, § 8-207
Me. Rev. Stat. Ann. tit. 11, § 8-207
Md. Code Ann., Com. Law § 8-207
Mass. Gen. Laws Ann. ch. 106, § 8-207
Mich. Comp. Laws Ann. § 440.8207
Minn. Stat. Ann. § 336.8-207
Miss. Code Ann. § 75-8-207
Mo. Ann. Stat. § 400.8-207
Mont. Code Ann. § 30-8-207
Neb. Rev. Stat. § 8-207
Nev. Rev. Stat. § 104.8207
N.H. Rev. Stat. Ann. § 382-A:8-207
N.J. Stat. Ann. § 12A:8-207
N.M. Stat. Ann. § 55-8-207
N.Y. U.C.C. Law § 8-207
N.C. Gen. Stat. § 25-8-207
N.D. Cent. Code § 41-08-15 (8-207)
Ohio Rev. Code Ann. § 1308.14 (UCC 8-207)
Okla. Stat. Ann. tit. 12A, § 8-207
Or. Rev. Stat. § 78.2070
13 Pa. Cons. Stat. Ann. § 8207
R.I. Gen. Laws § 6A-8-207
S.C. Code Ann. § 36-8-207
S.D. Codified Laws Ann. § 57A-8-207
Tenn. Code Ann. § 47-8-207
Tex. Bus. & Com. Code Ann. § 8.207
Utah Code Ann. § 70A-8-207
Vt. Stat. Ann. tit. 9A., § 8-207

Va. Code Ann. § 8.8-207
Wash. Rev. Code Ann. § 62A.8-207
W. Va. Code § 46-8-207
Wis. Stat. Ann. § 408.207
Wyo. Stat. § 34.1-8-207

STATEMENT OF MISSOURI TREASURER BOB HOLDEN
ON H.R. 2443
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS SUPERVISION,
REGULATION AND DEPOSIT INSURANCE
COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS
HOUSE OF REPRESENTATIVES
March 22, 1994

Mr. Chairman and Members of the Committee:

I am here today as Treasurer of the State of Missouri to express my strong support for H.R. 2443, and to urge the Committee to report the legislation as expeditiously as possible. H.R. 2443 is important not only to the State of Missouri but to all States. The nation's Governors, Treasurers and Unclaimed Property Administrators fully support the legislation. I am pleased to submit for the record as Exhibits A through D letters recently signed by the Governors of 46 States and the Treasurers of 40 States, and resolutions adopted by both the National Association of State Treasurers and the National Association of Unclaimed Property Administrators, endorsing the legislation and urging its prompt enactment.

The strong support for this legislation continues unabated. As you know, H.R. 2443 now has 322 co-sponsors, and S. 1715, its companion bill in the Senate, now has 79 co-sponsors Current co-sponsor lists are appended to my Statement as Exhibits E and F.

Iowa State Treasurer Michael L. Fitzgerald, the current chair of the Unclaimed Property Committee of the National Association of State Treasurers and past president of the National Association of Unclaimed Property Administrators, has asked that his Statement be submitted for the record. Unfortunately, Treasurer Fitzgerald could not be here today due to a prior commitment. His Statement includes a brief background history on State unclaimed property laws and their historic functions, as well as the federal rules of escheat as to which there is consensus, which I will not repeat. It suffices to say that the escheat laws serve important sovereign interests, and there is consensus among the States in virtually all areas of escheat policy except the one at issue here today.

H.R. 2443 can be summarized in a single word -- fairness. The issue and policy choices are simple, although the technicalities may be complex. The issue for this Committee to decide is whether two or three -- rather than all -- States should be permitted to escheat more than $100 million annually of interest and dividends paid by taxpayers of and companies headquartered in all 50 States.

Expeditious action on H.R. 2443 is necessary to ensure that all States are treated fairly, and that none are left behind in the wake of recent legal maneuvering by Delaware and New York. On January 21, 1994, Delaware filed papers with the Supreme Court seeking to withdraw its litigation against New York, and the Special Master on March 15, 1994 recommended the granting of this motion. Delaware and New York also announced that New York would pay Delaware $200 million in full settlement of Delaware's claim of $891 million out of the $1 billion New York has seized since 1972. This payment amounts to a windfall of $800 for each and every Delaware household. The Special Master also has ordered that discovery be completed by April 30, 1994.

I am not an attorney and do not pretend to understand the legal implications of this maneuvering. I do know, however, that neither Missouri nor any of the other 47 States has received one cent of the $1 billion from Delaware or New York. Only the certainty of swift and decisive legislative action will assure that Missouri and all other States are treated fairly, whether by settlement with Delaware and New York under the threat of imminent legislation, or by enactment of the legislation itself. If H.R. 2443 is not enacted before the Supreme Court enters a final judgment -- which likely will occur soon given the Master's recent scheduling order -- then three States alone will divide the $1 billion taken by New York.

The Equitable Escheatment Act directly affects a program Missouri has had in effect since 1984, and similar programs in all States. The Missouri Unclaimed Property Program has collected over $68 million since its inception and is expected to receive approximately $14 million in unclaimed property during the current fiscal year. Through newspaper publication of the names and addresses of owners, print and television publicity, direct owner searches and event promotions, we have returned to their rightful owners about 25% of the funds collected during the past three years, and expect to return about $3 million this fiscal year. Those funds not claimed become general revenue of the State for the benefit of all its citizens. Claims can be made at any time by missing owners; we hold the property in perpetuity as custodian on their behalf.

The Present Distribution Scheme Is Unfair

The legislation before this Committee was necessitated by the decision of the U.S. Supreme Court in Delaware v. New York. Constrained by past precedent, the Court held that under federal common law, owner-unknown unclaimed securities distributions go to the State of whatever financial intermediary (bank, brokerage firm or depository) happens to be holding the distributions when they become stuck in the course of payment by an issuer to a beneficial owner.

This decision means that unless H.R. 2443 is enacted into law, the approximately $1 billion of securities distributions seized by New York since 1972 will be divided by only three States -- New York, Delaware and Massachusetts. The 47 remaining States collectively would receive less than $2 million. Similarly, the $100-150 million of such funds which accrue annually will also be divided almost entirely by those three States, with the remaining 47 States collectively dividing between $200,000 and $300,000.

This is so because of the happenstance that most large brokerage firms are incorporated in Delaware, the largest securities depository and most money center banks are incorporated in New York, and one of the largest brokerage firms is incorporated in Massachusetts. This division is grossly unfair and should not be permitted.

Let me give you an example in the most concrete terms to demonstrate the patent unfairness of this allocation. The State of Missouri has issued approximately $1.5 billion in general obligation and other bonds over the past five years. These bonds are sold to investors to finance Missouri's university system, mass transit, environmental control, hospital and health care and other capital projects. Money to pay the interest on these bonds is raised by taxes on Missouri citizens. Over the past five years, Missouri taxpayers paid $545 million in total debt service on Missouri's outstanding bond obligations.

If an interest payment on one of these bonds does not reach the beneficial owner -- the investor who owns the bond -- but instead ends up in the hands of Merrill Lynch, which does not know to whom the money belongs, it will go to the State of Delaware to be used to finance projects that benefit the citizens of Delaware, solely because Merrill Lynch is incorporated in

Delaware. If that same interest payment ends up in the hands of First Boston, it will go to the Commonwealth of Massachusetts, to be used to finance projects that benefit the citizens of Massachusetts, solely because First Boston is incorporated in Massachusetts. If that same interest payment ends up in the hands of the Depository Trust Company or Chemical Bank, it will go to the State of New York, to be used to finance projects that benefit the citizens of New York, solely because these financial intermediaries are chartered in New York.

In none of these circumstances will the interest payment be returned to the State of Missouri to benefit its citizens and taxpayers, even though Missouri taxpayers' money was used to make the payment in the first place.

This is wrong. There is no just reason why Missouri bond money should be used to finance projects or balance the budget of New York, Delaware or Massachusetts, and no one who testifies in support of the bill can demonstrate otherwise. This money should be returned to the people of the State of Missouri.

The same holds true for interest on bond obligations paid by hundreds of cities and municipalities in Missouri, and for dividends paid by hundreds of companies headquartered in Missouri, such as Anheuser-Busch, Emerson Electric, Marion Merrell-Dow, McDonnell-Douglas and Monsanto, which have more than 43,000 employees in Missouri. Interest and dividend payments of those companies, if H.R. 2443 is not enacted, would go to New York, Delaware and Massachusetts.

H.R. 2443 Is Fair

I am familiar with the arguments raised by opponents of H.R. 2443, and I urge you to reject them.

A. The Rule of Delaware v. New York is an Aberration

New York, Delaware and Massachusetts have argued that enactment of H.R. 2443 would be akin to making them disgorge revenues earned from their natural resources. This is topsy-turvy, for the funds raised by Missouri taxpayers and corporations headquartered in Missouri are Missouri resources no less than the shorelines of Delaware and Massachusetts are Delaware and Massachusetts resources, and the Broadway theater industry of New York is a New York resource.

Unclaimed property laws generally return property to the State with the strongest ties to the property. Thus, owner-known intangible property is returned to the State of the owner's last-known address; owner-unknown intangible property is returned to the State of origination; and real property is escheated by the State in which the real property is located. The Supreme Court rule regarding owner-unknown unclaimed securities distributions is an aberration from these rules. The intermediary holding the funds is merely a conduit -- trying to transmit the funds from an originator (issuer) to an owner -- and is neither the owner nor the originator of the funds.

B. The Fiscal Impact on Missouri and Other States is Not De Minimis

New York, Delaware and Massachusetts also have argued that the impact on the fisc of my State and other States will be minimal. If it were minimal, their opposition would not be so fierce, for they hope to gain what my State and other States lose. Rest assured that I have looked into this carefully; the amount of money we will receive is substantial. Even if it were not substantial, fairness requires that taxes and profits of Missouri citizens be returned to Missouri.

C. New York Should Be Required to Disgorge Monies it Wrongfully Seized

There is nothing unfair about requiring New York to disgorge money under H.R. 2443 to all States. The Supreme Court has already held that New York must disgorge the funds it wrongfully seized. The Special Master in the case (a distinguished commercial law expert, then-Dean of the University of Virginia Law School, subsequently Provost of the University of Virginia and President-designate of the University of Rochester), rejected New York's objections that requiring it to disgorge the monies it took over the past 20 years would be unfair. The Master noted that New York's purported "hardship represents a calculated risk [it] has imposed on itself, and [requiring it to disgorge is] not an unjust surprise or unfair burden." Since New York must disgorge, the question before this Committee is to which States: to Delaware and Massachusetts alone, or to all States on an equitable basis.

H.R. 2443 Is Administratively Feasible

Industry opposition should not be allowed to derail H.R. 2443. Banks and brokerage firms are already required to turn over owner-known securities distributions to all the States of those owners. Thus, a recent survey of the 47 States supporting H.R. 2443 undertaken by Iowa Treasurer Fitzgerald with respect to several large brokerage firms, and discussed in his Statement, demonstrates knowledge of and compliance with the laws of all 50 States. For example, one such brokerage company member, within the past five years, turned over owner-known unclaimed distributions to at least 46 States; another filed with at least 44 States; a third filed with at least 43; and a fourth filed with at least 40. Thus, banks and brokerage firms already track and comply with the unclaimed property laws of all States, as they do not know to which States they will have to report each year.

Nor will the banking and securities industry be subject to repetitive state audits under H.R. 2443. Allocating funds among all States instead of concentrating funds in three States should reduce -- not increase -- the audit risk of that industry. Despite the fact that the largest out-of-State brokerage firms filed unclaimed property reports with, and remitted owner-known property to, the State of Missouri during the past five years, none have been subjected to audit by the State of Missouri. In fact, Missouri has never conducted an out-of-State audit. New York, in contrast, conducted in excess of 250 audits with respect to the property at issue from 1976 to 1988 alone.

Under H.R. 2443, neither the banking nor the securities industry must disgorge past monies already paid to New York; only New York must do so. Thus, there is no burden on the industry for the past. And while the bill imposes requirements on the industry with respect to dividends and interest accruing in the future, we are talking about one of the most sophisticated, computerized industries in the world. The Special Master stated that his recommendation, which is embodied in H.R. 2443, would be "simple and inexpensive to implement." In addition, we offered to work with industry representatives in an attempt to address their concerns. Their concerns apparently were not sufficiently great to induce them to accept our offer. Nonetheless, our offer remains open. Our purpose is not to create burdens for industry.

CONCLUSION

The Supreme Court invited Congress to overturn its decision, and to substitute a fair federal legislative rule for an inequitable federal common law rule. In 1974, Congress overturned the Supreme Court's inequitable money order decision which gave unclaimed money orders to one State -- New York. I urge the Committee to expeditiously take the first step in doing so again.

Thank you.

STATE OF TEXAS
STATE OF SOUTH CAROLINA.

February 4, 1994

Honorable Thomas S Foley
Speaker of the House of Representatives
Washington, D C. 20515

Honorable George J Mitchell
Majority Leader of the Senate
Washington, D C 20510

Dear Speaker Foley and Majority Leader Mitchell

As Governors of our respective States, we write to express our strong support for H R 2443 and S. 1715 (the Equitable Escheatment Act) and to request your assistance in guiding the legislation through the Congress within the next 30 days This legislation is important to our States because it allocates non-tax revenue fairly among all States and does not place extra burdens on the taxpayers of our States

Failure to expeditiously enact this legislation would jeopardize the fair distribution of $1 billion in dividends and interest that originated in all States, and potentially permit only three States (Delaware, New York and Massachusetts) to divide these funds To allow those States to escheat interest paid by taxpayers of our States on our State and municipal bonds, and dividends paid by companies headquartered in our States, would be grossly unfair and is wholly unacceptable.

The Equitable Escheatment Act authorizes the State from which owner-unknown unclaimed dividends and interest originated to escheat such funds in accordance with State laws Under the legislation, the $1 billion seized by New York would be fairly allocated among all the States, including New York, which would retain $200-$250 million The legislation also would apply to the $100-$150 million of such funds which will continue to accrue annually

H.R. 2443 and S 1715 would overturn the inequitable decision of the Supreme Court in Delaware v. New York. In this on-going suit involving all 50 States, the Supreme Court is requiring New York to disgorge an unspecified amount of these funds Delaware has claimed $891 million from New York; and Massachusetts is claiming $40-$50 million Under the Supreme Court decision, the 47 other States would recover less than $2 million, or 2 cents per household.

The Court invited the States to "air their grievances before Congress" which, the Court acknowledged, could "settle this dispute" through appropriate legislation. Congressional support to expeditiously and fairly resolve this dispute has been overwhelming. H.R. 2443 has 315 co-sponsors; and S. 1715 has 74 co-sponsors.

Time is now of the essence, however. On January 21, 1994, New York settled its litigation with Delaware for $200 million (or $800 per Delaware household), with New York keeping $800 million New York has already paid $35 million to Delaware, although neither the

STATE OF TEXAS
STATE OF SOUTH CAROLINA

Master nor the Supreme Court has approved the settlement. Delaware and New York have not settled with the other 47 States. Only the certainty of swift and decisive legislative action will assure that our States are treated fairly, whether by settlement with Delaware and New York under the threat of imminent legislation or by enactment of the legislation itself.

Your leadership is essential to the fairest possible outcome which can only be achieved by moving the legislation through the House on its suspension calendar and by putting it on a fast track in the Senate.

We appreciate your support and stand ready to assist you with our delegations in every way possible.

Very truly yours,

Ann W. Richards Governor of Texas	Carroll Campbell Governor of South Carolina
Terry E. Branstad Governor of Iowa	[illegible] Governor of Connecticut
Lawton Chiles Governor of Florida	Jim B. Hunt Jr. Governor of NC
Edward T. Schafer Governor of North Dakota	Jim Guy Tucker Governor of Arkansas
John Engler Governor of Michigan	Mel Carnahan Governor of Missouri
Howard Dean Governor of Vermont	Joan Finney Governor of Kansas

STATE OF TEXAS
STATE OF SOUTH CAROLINA

Governor of S.D.

Governor of Kentucky

Governor of [illegible]

Governor of Nebr.

Governor of Wisconsin

Governor of Colo.

Governor of Oklahoma

Governor of WEST VIRGINIA

Governor of Mississippi

Governor of Hawaii

Governor of Rhode Island.

Governor of Arizona

Governor of Utah

Governor of GEORGIA

Governor of Virginia

Governor of NEVADA

STATE OF TEXAS
STATE OF SOUTH CAROLINA

Barbara Roberts
Governor of OREGON

Pete Wilson
Governor of CALIFORNIA

Stephen Merrill
Governor of New Hampshire

[illegible]
Governor of Pennsylvania

Jim Edgar
Governor of ILLINOIS

Edwin Edwards
Governor of Louisiana

Cecil D. Andrus
Governor of IDAHO

John R. McKernan Jr.
Governor of Maine

George V. Voinovich
Governor of OHIO

Marc Racicot
Governor of Montana

Ned McWherter
Governor of TENNESSEE

Arne H. Carlson
Governor of Minnesota

Evan Bayh
Governor of INDIANA

Bruce King
Governor of New Mexico

William Donald Schaefer
Governor of Maryland

STATE OF ALABAMA
STATE OF NEW JERSEY
STATE OF WASHINGTON

February 24, 1994

Honorable Thomas S Foley
Speaker of the House of Representatives
Washington, D.C 20515

Honorable George J Mitchell
Majority Leader of the Senate
Washington, D C 20510

Dear Speaker Foley and Majority Leader Mitchell

We are pleased to join the February 4, 1994 letter signed by 43 Governors urging Congress to enact H R 2443 and S 1715 (the Equitable Escheatment Act) within the next few weeks. As you may know, New York and Delaware have declined to make a substantive settlement proposal to resolve the States' dispute over unclaimed securities distributions Notwithstanding their rigid stance -- and their failure even to respond to our past settlement proposals -- on February 16, 1994, the 47 States supporting the legislation made a substantive settlement proposal, a copy of which is attached

Until floor consideration of the legislation is scheduled. New York and Delaware have no incentive to negotiate in good faith, and will continue to ignore the equitable interests of the other States Your leadership is needed to ensure that all States are treated fairly, either through settlement or legislative enactment

Thank you again for your support

Very truly yours,

Jim Folsom
Governor of Alabama

Christine T Whitman
Governor of New Jersey

Mike Lowry
Governor of Washington

77-606 O - 94 - 9

STATE OF ALABAMA
STATE OF NEW JERSEY
STATE OF WASHINGTON

cc Honorable Robert H Michel, Minority Leader of the House
Honorable Robert J Dole, Minority Leader of the Senate
Honorable Henry B Gonzalez, Chairman,
Committee on Banking, Finance and Urban Affairs
Honorable Donald W Riegle, Jr., Chairman,
Committee on Banking, Housing and Urban Affairs
Honorable Stephen L. Neal, Chairman,
Subcommittee on Financial Institutions Supervision, Regulation and Deposit Insurance
Honorable Christopher J Dodd, Chairman
Subcommittee on Securities

STATE OF IOWA
STATE OF TEXAS

March 1, 1994

Honorable Henry B. Gonzalez
Chairman, Committee on Banking,
Finance and Urban Arrairs
2129 Rayburn House Office Building
Washington, D.C 20515

Honorable Stephen L. Neal
Chairman, Subcommittee on Financial
Institutions Supervision, Regulation and Insurance
2463 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairmen Gonzalez and Neal:

As Treasurers of our respective States, we write to reaffirm our strong support for H.R. 2443 (The Equitable Escheatment Act), and to request your assistance in guiding the legislation through both the Subcommittee and the full Banking Committee within the next few weeks.

New York has agreed to pay Delaware $200 million of the $1 billion seized by New York over the past 20 years. The prospective funds at stake also are considerable -- between $100 and $150 million annually. Without the legislation, only three States (New York, Delaware and Massachusetts) will divide those funds. Under the legislation, those funds will be allocated equitably among all the States from which the funds originated. We do not consider our States' fair share of these funds to be either "meager" or "small change," as asserted by New York.

Notwithstanding New York's $200 million settlement with Delaware on January 21, 1994, neither New York, Delaware nor Massachusetts has made any settlement proposal to the 47 States who support the legislation Only the certainty of early and decisive legislative action will bring New York to the settlement table. Until hearings are held and a mark-up scheduled, New York has no incentive to settle with our States

For these reasons, we urge you to hold hearings and mark-up H R 2443 within the next few weeks.

Very truly yours,

Michael L. Fitzgerald
Treasurer of Iowa

Martha Whitehead
Treasurer of Texas

Samuel Shapiro
Treasurer of MAINE

Grady L. Patterson
Treasurer of South Carolina

cc: All Members, Committee on Banking, Finance and Urban Affairs

March 1, 1994
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George A Thomas
Treasurer of New Hampshire

Tony West
Treasurer of Arizona

Marjorie H. O'Laughlin
Treasurer of Indiana

Bill Nelson
Treasurer of SCTG Florida

Edward T. Alter
Treasurer of UTAH

Joseph M. Suggs Jr
Treasurer of CONNECTICUT

Michael A. McGrath
Treasurer of Minnesota

Lucille Maurer
Treasurer of MARYLAND

Dawn E. Rockey
Treasurer of Nebraska

Gail S. Schoettler
Treasurer of Colorado

Ronald L. Tillett
Treasurer of VIRGINIA

Mary Landrieu
Treasurer of LA

Sally Thompson
Treasurer of Kansas

Marshall Bennett
Treasurer of MISSISSIPPI

Bob Holden
Treasurer of Missouri

Paul W. Ruse Jr
Treasurer of Vermont

March 1, 1994
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Kathleen Brown
Treasurer of

California
Treasurer of

Samuel Shapiro
Treasurer of

Maine
Treasurer of

Robert L. Seale
Treasurer of Nevada

Frances Jones Mills
Treasurer of KENTUCKY

Larrie Bailey
Treasurer of WEST VIRGINIA

Lois Menzies
Treasurer of MONTANA

Steve Adams
Treasurer of Tennessee

Harlan E. Boyles
Treasurer of North Carolina

Nancy J. Mayer
Treasurer of

Rhode Island
Treasurer of

Cathy Zeuske
Treasurer of WISCONSIN

Lydia Justice Edwards
Treasurer of Idaho

Patrick Quinn
Treasurer of ILLINOIS

David W. King
Treasurer of New Mexico

March 1, 1994
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Treasurer of ALASKA

Treasurer of New Jersey

Treasurer of South Dakota

Treasurer of Wyoming

Treasurer of OREGON

Treasurer of Ohio

TREASURER OF ARKANSAS

Commonwealth of Pennsylvania
Office of the Treasurer
Harrisburg
17120

CATHERINE BAKER KNOLL
TREASURER

March 4, 1994

The Honorable Henry B. Gonzalez
Chairman, Committee on Banking,
Finance and Urban Affairs
2413 Rayburn House Office Building
Washington, DC 20515

The Honorable Stephen L. Neal
Chairman, Subcommittee on Financial
Institutions Supervision, Regulation and Insurance
2469 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Gonzalez and Neal:

As Treasurer of the Commonwealth of Pennsylvania, I write to reaffirm my strong support for H.R. 2443 (The Equitable Escheatment Act), and to request your assistance in guiding the legislation through both the Subcommittee and the full Banking Committee within the next few weeks.

New York has agreed to pay Delaware $200 million of the $1 billion seized by New York over the past 20 years. The prospective funds at stake also are considerable--between $100 and $150 million annually. Without the legislation, only three States (New York, Delaware and Massachusetts) will divide those funds. Under the legislation, those funds will be allocated equitably among all the States from which the funds originated. I do not consider Pennsylvania's fair share of these funds to be either "meager" or "small change" as asserted by New York.

Notwithstanding New York's $200 million settlement with Delaware on January 21, 1994, neither New York, Delaware nor Massachusetts has made any settlement proposal to the 47 States who support the legislation. Only the certainty of early and decisive legislative action will bring New York to the settlement table. Until hearings are held and a mark-up scheduled, New York has no incentive to settle with Pennsylvania.

PHONE 717-787-2465
FAX 717-783-9760

The Honorable Henry B. Gonzalez
The Honorable Stephen L. Neal
March 4, 1994
Page 2

For these reasons, I urge you to hold hearings and mark-up H.R. 2443 within the next few weeks.

Respectfully yours,

Catherine Baker Knoll

CATHERINE BAKER KNOLL
Treasurer

CBK/ajb

cc: All Members, Committee on Banking, Finance and Urban Affairs

NAST

National Association of State Treasurers

RESOLUTION

URGING ENACTMENT OF FEDERAL LEGISLATION (HR 2443) OVERTURNING THE SUPREME COURT'S DECISION IN DELAWARE V. NEW YORK, No.111 ORIGINAL

WHEREAS, Numerous brokerage firms, banks and depositories acting as intermediaries in the distribution of dividend and interest payments hold large amounts of unclaimed securities distributions belonging to persons unknown to them; and

WHEREAS, The dividends and interest on municipal bonds and corporate securities are paid, respectively, by taxpayers of and companies doing business in all States; and

WHEREAS, It would be inequitable for virtually all of the owner-unknown securities distributions to be paid to only two States (Delaware and New York), since the originators of such distributions are located in all States; and

WHEREAS, Presently there is no federal legislation that requires the equitable distribution of unclaimed securities distributions to the States from which they were paid; and

WHEREAS, The Supreme Court in Delaware v. New York invited Congress to overturn the inequitable method of distribution adopted by the Court; and

WHEREAS, In 1974, Congress enacted legislation overturning the Supreme Court's inequitable ruling with respect to unclaimed money orders and traveler's checks in Pennsylvania v. New York, 407 U.S. 206 (1972).

NOW, THEREFORE BE IT RESOLVED that the National Association of State Treasurers urges Congress to enact HR 2443 and companion Senate legislation to require that owner-unknown unclaimed securities distributions held by intermediaries be returned to the States of the taxpayers and companies that paid them so that the States can hold and disburse these unclaimed funds in accordance with their laws for the benefit of their residents.

BE IT FURTHER RESOLVED that the National Association of State Treasurers prepare and transmit a copy of this Resolution to the Vice President of the United States as the presiding officer of the Senate, and to the Speaker of the House of Representatives.

Adopted this 3rd day of
August, 1993 at the
18th Annual Conference,
Coeur d'Alene, Idaho.

Lucille Maurer
Lucille Maurer, President

NAUPA

National Association of
Unclaimed Property Administrators

RESOLUTION URGING THE ENACTMENT OF FEDERAL LEGISLATION (H.R. 2443)

WHEREAS, Numerous brokerage firms, banks and depositories acting as intermediaries in the distribution of dividend and interest payments hold large amounts of unclaimed distributions belonging to persons unknown to them; and

WHEREAS, The dividends and interest on municipal bonds and corporate securities are paid, respectively, by taxpayers of and companies doing business in all States; and

WHEREAS, It would be inequitable for virtually all of the owner-unknown distributions to be paid to only two States (Delaware and New York), since the payors of such distributions are located in all States; and

WHEREAS, Presently there is no federal legislation that requires the equitable distribution of unclaimed securities distribution adopted by the Court; and

WHEREAS, The Supreme Court in Delaware v. New York invited Congress to overturn the inequitable method of distribution adopted by the Court; and

WHEREAS, in 1974, Congress enacted legislation overturning the Supreme Court's inequitable ruling with respect to unclaimed money orders and traveler's checks in Pennsylvania v. New York, 407 U.S. 206 (1972); therefore, be it

NOW RESOLVED BY THE NATIONAL ASSOCIATION OF UNCLAIMED PROPERTY ADMINISTRATORS, That Congress is hereby urged to enact H.R. 2443 and companion Senate legislation to require that owner-unknown unclaimed securities distributions held by intermediaries be returned to the States of the taxpayers and companies that paid them so that the States can hold and disburse these unclaimed funds in accordance with their laws for the benefit of their residents; and, be it

RESOLVED, That this Resolution become effective upon passage and approval.

Passed this 31th Day of August 1993.

George De Leon, Jr.

George De Leon, Jr.
President, NAUPA

CO-SPONSORS OF H.R. 2443

SUMMARY	TOTAL*	DEMOCRATS	REPUBLICANS	INDEPENDENT	VACANCY
	322/393	199/231	122/160	1/1	1

* Totals do not include the delegations from Delaware, Massachusetts or New York.

STATE	TOTAL	DEMOCRATS	REPUBLICANS	INDEPENDENT
ALABAMA	6/7	Mr. Bevill Mr. Browder Mr. Cramer	Mr. Bachus Mr. Callahan Mr. Everett	
ALASKA	1/1		Mr. Young	
ARIZONA	2/6	Mr. Pastor	Mr. Stump	
ARKANSAS	2/4		Mr. Dickey Mr. Hutchinson	
CALIFORNIA	47/52	Mr. Becerra Mr. Beilenson Mr. Berman Mr. Brown Mr. Condit Mr. Dixon Mr. Dooley Mr. Edwards Ms. Eshoo Mr. Farr Mr. Fazio Mr. Filner Mr. Hamburg Ms. Harman Mr. Lantos Mr. Lehman Mr. Martinez Mr. Matsui Mr. Miller Mr. Mineta Ms. Pelosi Ms. Roybal-Allard Mr. Stark Mr. Torres Mr. Tucker Ms. Waters Ms. Woolsey	Mr. Calvert Mr. Cox Mr. Cunningham Mr. Doolittle Mr. Dornan Mr. Dreier Mr. Gallegly Mr. Herger Mr. Horn Mr. Huffington Mr. Hunter Mr. Kim Mr. Lewis Mr. McCandless Mr. McKeon Mr. Packard Mr. Pombo Mr. Rohrabacher Mr. Royce Mr. Thomas	
COLORADO	3/6	Ms. Schroeder Mr. Skaggs	Mr. Schaeffer	

CO-SPONSORS OF H.R. 2443

STATE	TOTAL	DEMOCRATS	REPUBLICANS	INDEPENDENT
CONNECTICUT	4/6	Ms. DeLauro Mr. Gejdenson Ms. Kennelly	Mr. Shays	
FLORIDA	22/23	Mr. Bacchus Ms. Brown Mr. Deutsch Mr. Gibbons Mr. Hastings Mr. Hutto Mr. Johnston Ms. Meek Mr. Peterson Ms. Thurman	Mr. Bilirakis Mr. Canady Mr. Diaz-Balart Ms. Fowler Mr. Goss Mr. Lewis Mr. McCollum Mr. Mica Mr. Miller Ms. Ros-Lehtinen Mr. Shaw Mr. Stearns	
GEORGIA	11/11	Mr. Bishop Mr. Darden Mr. Deal Mr. Johnson Mr. Lewis Ms. McKinney Mr. Rowland	Mr. Collins Mr. Gingrich Mr. Kingston Mr. Linder	
HAWAII	2/2	Mr. Abercrombie Ms. Mink		
IDAHO	1/2	Mr. LaRocco		
ILLINOIS	13/20	Ms. Collins Mr. Costello Mr. Durbin Mr. Evans Mr. Gutierrez Mr. Poshard Mr. Reynolds Mr. Rush Mr. Sangmeister	Mr. Fawell Mr. Manzullo Mr. Michel Mr. Porter	

CO-SPONSORS OF H.R. 2443

STATE	TOTAL	DEMOCRATS	REPUBLICANS	INDEPENDENT
INDIANA	9/10	Mr. Hamilton Mr. Jacobs Ms. Long Mr. McCloskey Mr. Roemer Mr. Sharp Mr. Visclosky	Mr. Burton Mr. Myers	
IOWA	5/5	Mr. Smith	Mr. Grandy Mr. Leach Mr. Lightfoot Mr. Nussle	
KANSAS	3/4	Mr. Glickman	Ms. Meyers Mr. Roberts	
KENTUCKY	4/6	Mr. Baesler Mr. Barlow Mr. Mazzoli	Mr. Rogers	
LOUISIANA	7/7	Mr. Fields Mr. Hayes Mr. Jefferson Mr. Tauzin	Mr. Baker Mr. Livingston Mr. McCrery	
MAINE	2/2	Mr. Andrews	Ms. Snowe	
MARYLAND	5/8	Mr. Cardin Mr. Hoyer Mr. Mfume Mr. Wynn	Mr. Bartlett	
MICHIGAN	3/16	Mr. Barcia Mr. Conyers Mr. Ford		
MINNESOTA	7/8	Mr. Minge Mr. Oberstar Mr. Peterson Mr. Sabo Mr. Vento	Mr. Grams Mr. Ramstad	

CO-SPONSORS OF H.R. 2443

STATE	TOTAL	DEMOCRATS	REPUBLICANS	INDEPENDENT
MISSISSIPPI	5/5	Mr. Montgomery Mr. Parker Mr. Taylor Mr. Thompson Mr. Whitten		
MISSOURI	7/9	Mr. Clay Ms. Danner Mr. Skelton Mr. Volkmer Mr. Wheat	Mr. Emerson Mr. Talent	
MONTANA	1/1	Mr. Williams		
NEBRASKA	3/3	Mr. Hoagland	Mr. Barrett Mr. Bereuter	
NEVADA	2/2	Mr. Bilbray	Ms. Vucanovich	
NEW HAMPSHIRE	2/2	Mr. Swett	Mr. Zeliff	
NEW JERSEY	12/13	Mr. Andrews Mr. Hughes Mr. Klein Mr. Menendez Mr. Pallone Mr. Payne Mr. Torricelli	Mr. Franks Mr. Gallo Ms. Roukema Mr. Saxton Mr. Smith	
NEW MEXICO	1/3		Mr. Schiff	
NORTH CAROLINA	12/12	Ms. Clayton Mr. Hefner Mr. Lancaster Mr. Neal Mr. Price Mr. Rose Mr. Valentine Mr. Watt	Mr. Ballenger Mr. Coble Mr. McMillan Mr. Taylor	
NORTH DAKOTA	0/1			

CO-SPONSORS OF H.R. 2443

STATE	TOTAL	DEMOCRATS	REPUBLICANS	INDEPENDENT
OHIO	16/19	Mr. Applegate Mr. Brown Mr. Fingerhut Mr. Hall Ms. Kaptur Mr. Mann Mr. Sawyer Mr. Strickland Mr. Traficant	Mr. Boehner Mr. Gillmor Mr. Hobson Mr. Hoke Mr. Kasich Mr. Oxley Ms. Pryce	
OKLAHOMA	3/6*	Mr. Brewster Mr. McCurdy	Mr. Inhofe	
OREGON	3/5	Mr. DeFazio Ms. Furse Mr. Kopetski		

* One of the six seats is vacant.

STATE	TOTAL	DEMOCRATS	REPUBLICANS	INDEPENDENT
PENNSYLVANIA	18/21	Mr. Blackwell Mr. Borski Mr. Coyne Mr. Foglietta Mr. Holden Mr. Kanjorski Mr. Klink Ms. Margolies-Mezvinsky Mr. McHale Mr. Murphy Mr. Murtha	Mr. Clinger Mr. Gekas Mr. Greenwood Mr. McDade Mr. Ridge Mr. Santorum Mr. Weldon	
RHODE ISLAND	2/2	Mr. Reed	Mr. Machtley	
SOUTH CAROLINA	6/6	Mr. Clyburn Mr. Derrick Mr. Spratt	Mr. Inglis Mr. Ravenel Mr. Spence	
SOUTH DAKOTA	0/1			
TENNESSEE	9/9	Mr. Clement Mr. Cooper Mr. Ford Mr. Gordon Ms. Lloyd Mr. Tanner	Mr. Duncan Mr. Quillen Mr. Sundquist	

CO-SPONSORS OF H.R. 2443

STATE	TOTAL	DEMOCRATS	REPUBLICANS	INDEPENDENT
TEXAS	29/30	Mr. Andrews Mr. Brooks Mr. Bryant Mr. Chapman Mr. Coleman Mr. de la Garza Mr. Edwards Mr. Frost Mr. Geren Mr. Gonzalez Mr. Green Mr. Hall Ms. Johnson Mr. Laughlin Mr. Ortiz Mr. Pickle Mr. Sarpalius Mr. Stenholm Mr. Tejeda Mr. Washington Mr. Wilson	Mr. Armey Mr. Barton Mr. Bonilla Mr. Combest Mr. Delay Mr. Fields Mr. Johnson Mr. Smith	
UTAH	3/3	Mr. Orton Ms. Shepherd	Mr. Hansen	
VERMONT	1/1			Mr. Sanders
VIRGINIA	11/11	Mr. Boucher Ms. Byrne Mr. Moran Mr. Payne Mr. Pickett Mr. Scott Mr. Sisisky	Mr. Bateman Mr. Bliley Mr. Goodlatte Mr. Wolf	
WASHINGTON	6/9	Mr. Dicks Mr. Inslee Mr. Kreidler Mr. McDermott Mr. Swift Ms. Unsoeld		
WEST VIRGINIA	2/3	Mr. Rahall Mr. Wise		

CO-SPONSORS OF H.R. 2443

STATE	TOTAL	DEMOCRATS	REPUBLICANS	INDEPENDENT
WISCONSIN	8/9	Mr. Barca Mr. Barrett Mr. Kleczka	Mr. Gunderson Mr. Klug Mr. Petri Mr. Roth Mr. Sensenbrenner	
WYOMING	1/1		Mr. Thomas	

Totals do not include the delegations from Delaware, Massachusetts or New York:

	DEM	REP		
Delaware	0	1	=	1
Massachusetts	8	2	=	10
New York	18	13	=	31
				42

SENATE CO-SPONSORS OF S. 1715, THE EQUITABLE ESCHEATMENT ACT

STATE	DEMOCRATS (42)	REPUBLICANS (37)
Alabama	Shelby Heflin	
Alaska		Murkowski Stevens
Arizona	DeConcini	McCain
Arkansas	Bumpers Pryor	
California	Boxer Feinstein	
Colorado	Campbell	Brown
Connecticut	Lieberman	
Florida	Graham	Mack
Georgia	Nunn	Coverdell
Hawaii	Inouye Akaka	
Idaho		Craig Kempthorne
Illinois	Simon Moseley-Braun	
Indiana		Lugar Coats
Iowa	Harkin	Grassley
Kansas		Dole Kassebaum
Kentucky	Ford	
Louisiana	Johnston Breaux	
Maine	Mitchell	Cohen
Maryland	Mikulski	
Michigan	Riegle	
Minnesota		Durenberger
Mississippi		Cochran Lott
Missouri		Danforth Bond
Montana	Baucus	Burns
Nebraska	Exon Kerrey	
Nevada	Reid Bryan	

SENATE CO-SPONSORS OF S. 1715, THE EQUITABLE ESCHEATMENT ACT

STATE	DEMOCRATS (42)	REPUBLICANS (37)
New Hampshire		Smith Gregg
New Jersey	Bradley Lautenberg	
New Mexico	Bingaman	
North Carolina		Faircloth Helms
Ohio	Glenn Metzenbaum	
Oklahoma	Boren	Nickles
Pennsylvania	Wofford	Specter
Rhode Island	Pell	Chafee
South Carolina	Hollings	Thurmond
South Dakota	Daschle	Pressler
Texas		Hutchison
Utah		Hatch Bennett
Vermont	Leahy	Jeffords
Virginia	Robb	Warner
Washington	Murray	Gorton
Wisconsin	Kohl Feingold	
Wyoming		Wallop Simpson

TESTIMONY OF

KATHLEEN BROWN

CALIFORNIA STATE TREASURER

before the

HOUSE COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS SUPERVISION, FINANCIAL REGULATION AND DEPOSIT INSURANCE

Washington, DC

March 22, 1994

Mr. Chairman, Members of the Committee, thank you for the opportunity to testify today.

I welcome the chance to speak in support of HR 2443, the Equitable Escheatment Act of 1993. This is a *common sense* proposal that will lead to the equitable return of millions of dollars in unclaimed dividend distributions to the state of California and to other states.

It does not make sense, nor is it fair, that unclaimed dividends revert to states where financial intermediaries are incorporated, instead of states where funds originate.

It does not make sense, nor is it fair, that three states -- New York, Delaware and Massachusetts -- have divided up $1 billion in unclaimed dividend and interest distributions while the remaining 47 states have collectively received less than $2 million.

It does not make sense, nor is it fair, that those three states will be allowed to divide up between $100 million and $150 million annually while the rest of us collectively receive less than $300,000.

And it does not make sense, nor is it fair, that three states collect money from taxpayers of all states just because the brokerage houses, depositories and banks are located in their jurisdictions.

HR 2443 would fairly and equitably resolve this issue by distributing close to $1 billion of unclaimed dividend distributions to the states where the funds originated.

As California's Treasurer and as a Californian, I have a particular interest in this legislation.

Roughly 13 percent of the nation's shareholders are Californians. Ten percent of the nation's largest public corporations have their principal executive offices in the Golden State. And yet, California receives *only* one to two percent of all unclaimed dividend distributions. That just doesn't make sense and it isn't fair.

If passed, the Equitable Escheatment Act would result in an estimated $100 million reverting immediately to California and $10 million reverting annually thereafter. This money would go into California's unclaimed property fund, which can be used for general fund purposes.

This legislation will return funds owed to California by first providing that the owner-unknown interest paid by California taxpayers on a municipal bond would be returned to our state.

And second, it would mean that owner-unknown dividends paid by a public company would be returned to the state in which the company maintains its principal executive office.

For California it could mean unclaimed dividends for such California companies as Chevron, Atlantic Richfield, Hewlett Packard, Rockwell International, Lockheed, Unical, Occidental Petroleum, Apple Computer, and Intel, among others.

With California's budget deficit estimated to be between $3 billion and $6 billion, *every* tax dollar counts. And California deserves its fair share of unclaimed dividend distributions.

As a member of the legislative committee of the National Association of State Treasurers, I also want to reaffirm what our association made clear in a resolution last summer: Congress should enact HR 2443. We urge speedy passage of this bill. In Delaware v. New York, the U.S. Supreme Court invited Congress to overturn this inequitable method of distribution.

If you do not act before the Supreme Court enters a final judgement in this case -- which could be as early as next month -- all 47 states will lose out. And California will lose the $100 million owed to us.

I am aware of the securities and banking industry argument concerning the so-called "administrative nightmare" this bill might impose on them. This stands in striking contrast to the "can do" attitude they display when they want California to confer upon them some of the substantial securities and banking business we have to give out. For a sophisticated industry that deals in millions and millions of transactions, surely they can figure out how to fill out unclaimed property forms for 50 states.

I urge you to fight to ensure that a fairer and more just policy is enacted to return money rightfully-owed to California and all states.

Thank you.

STATES' RESPONSE TO APRIL 12, 1994 SIA LETTER

OWNER-UNKNOWN UNCLAIMED DISTRIBUTIONS ARE OWED TO BENEFICIAL OWNERS -- NOT INTERMEDIARIES -- AND H.R. 2443 IS NOT BURDENSOME TO BENEFICIAL OWNERS

The SIA argues that H R. 2443 is not equitable because the owner-unknown distributions in question are owing from one brokerage firm or bank to another brokerage firm or bank SIA is wrong All available evidence clearly demonstrates that the owner-unknown unclaimed securities distributions in question are owing to beneficial owners (who cannot be identified), the people with least ability to detect that they were underpaid The Special Master agrees, and Delaware conceded this before the Supreme Court

- **Brokers And Banks Are Far More Sophisticated Than Their Customers And Are Far More Likely To Detect Underpayments, As Delaware Itself Argued To The Supreme Court**
  In its brief to the U.S. Supreme Court, Delaware argued that the incentive for underpaid brokers to make a claim "and the practice of immediate reregistration by brokers of securities they plan to keep both suggest probable ownership by nonbrokers" of the funds escheated to New York Brokers and banks routinely monitor and research underpayments and pursue claims to recover distributions they did not receive, customers do not have such institutionalized tracking systems.

- **Underpayments To Customers Caused By Processing Errors Or A Broker's Failure To Credit One Of Its Millions Of Customers Are Far Less Likely To Be Identified Than Underpayments Caused By A Broker Holding A Certificate Registered To Another Broker**
  A customer, unlike an intermediary, lacks the sophistication to detect underpayments. SIA asserts that brokers and banks always pay their customers However, only about 02% of distributions paid get lost in the system The fact the brokers and banks usually pay their customers -- even 99.98% of the time -- does not support the SIA's position. As the Special Master stated "if it is the case that the intermediary is mistaken in thinking that it has paid all of its clients all of the funds to which they are entitled, that counts against, rather in favor of, treating the intermediary as beneficially interested in the unpaid residue of a distribution "

- **The Assertion That 97% Of Claims To New York Are Made By Intermediaries Is Misleading And Irrelevant**
  SIA argues that the owner-unknown distributions are owed to intermediaries because intermediaries make the largest number of claims after a distribution is escheated. There are at least two significant problems with this argument First, claims are made only with respect to a tiny percentage of the distributions New York seized The vast majority of the funds that are not claimed are what are at issue and those funds are far more likely to be owed to customers, who clearly lack the information and procedures that result in brokers and banks making claims.

  Second, this argument ignores the obvious fact that the intermediaries make claims on behalf of others As one of the brokerage firms deposed in the litigation stated, brokerage firms "[u]sually make the claim on behalf of somebody or one of their customers "

- **The SEC Treats Owner-Unknown Distributions As Customer Funds**
  In 1972, the SEC promulgated Rule 15c3-3, which requires brokerage firms to maintain a segregated bank account called the Special Reserve Bank Account for the Exclusive Benefit of Customers. Owner-unknown unclaimed distributions held by brokerage firms are placed in such Reserve Accounts for customers pursuant to Rule 15c3-3

- **H.R. 2443 Is Not Burdensome To Customers**
  Customers now go to their brokerage firms and banks to complain when they are fortunate enough to discover that they have not received the distributions to which they are entitled The brokerage firms and banks then make claims on their customers' behalf to the State that escheated the funds Nothing in H R 2443 changes this.

May 25, 1994

H.R. 2443 AS REVISED IS NOT BURDENSOME TO BANKS AND BROKERAGE FIRMS

The Securities Industry Association ("SIA") and some banks claim that H.R. 2443 would create significant new costs and burdens. Specifically, they complain that the legislation would (1) impose liability and audits on brokerage firms and banks with respect to funds previously paid to New York, (2) require brokerage firms and banks to keep track of the laws of all 50 States, (3) subject them to future audits by all 50 States, and (4) be burdensome to implement because the principal executive offices of issuers cannot be readily identified. The Special Master concluded that these objections have no merit, and that equitably allocating securities distributions to all States is administratively feasible and is not burdensome.

- **Brokerage Firms And Banks Would Not Be Subject To Liability And Audits With Respect To Past Payments Made To New York**
  The SIA's claim that the States would seek to recoup from brokerage firms and banks funds paid to New York in prior years is unfounded. The States do not intend to audit or recover those funds from brokerage firms or banks. The legislation requires New York -- not brokerage firms and banks -- to disgorge such funds. **The revised H.R. 2443 immunizes financial institutions from liability to one State for payments made to another State.**

- **Brokerage Firms And Banks Currently Comply With Escheat Laws Of All 50 States And Are Not Subjected To Repetitive State Audits**
  Brokerage firms and banks are presently required to file unclaimed property reports with, and remit owner-known property to, all 50 States irrespective of where they are located. They therefore already track and comply with the unclaimed property laws of all 50 States, and are subject to audit by all 50 States. They nevertheless have not been subjected to burdensome, repetitive audits by multiple States. Further, many brokerage firms and banks utilize one of a number of outside reporting services that prepare unclaimed property reports for filing in all States. These services track the unclaimed property laws of all 50 States and file reports for both owner-known and owner-unknown property. **The revised H.R. 2443 permits brokerage firms and banks to remit owner-unknown funds to a single repository for reallocation to all 50 States.**

- **The Principal Executive Offices Of Issuers Can Be Readily Identified From Standardized Computer Databases**
  The securities industry is one of the most computerized industries in the world. Banks and brokerage firms already identify each distribution they receive by what is known as a CUSIP number. CUSIP numbers are specific to each security and "uniquely identify the issuer" of the security. A simple computer link between CUSIP numbers and the States of issuers' principal executive offices -- contained in numerous databases commonly used in the industry (e.g., Standard & Poor's Corporate Descriptions) -- would enable brokerage firms and banks to comply with the legislation at minimal cost.

- **Interest On Unclaimed Distributions Held By Brokerage Firms And Banks Exceeds Compliance Costs**
  Brokerage firms and banks retain the interest that accrues on unclaimed securities distributions for the 3 to 7 years before they turn such property over to States. Interest on this "float" -- amounting to millions of dollars -- far outweighs compliance costs.

- **The SIA Has Refused To Provide Suggestions To Address The Burden Issue**
  The SIA declined the States' invitation to provide input into the administrative provisions of the bill, and to this date has not offered any proposals to address its purported concerns. The SIA's real concern is that its members will no longer be able to negotiate sweetheart deals and thereby retain a portion of the funds to which they are not entitled.

May 25, 1994

TESTIMONY OF JOSEPH D. MALONE

Treasurer and Receiver General of
the Commonwealth of Massachusetts

concerning H.R. 2443

before the Subcommittee on Financial Institutions Supervision, Regulation and Deposit Insurance
of the Committee on Banking

UNITED STATES HOUSE OF REPRESENTATIVES

March 22, 1994

My name is Joe Malone and I am the Treasurer and Receiver General for the Commonwealth of Massachusetts. As a duly elected constitutional officer, among my other responsibilities, I am charged with administering the Massachusetts Unclaimed Property Statute, our law for carrying out a traditional police power of the state.

Thank you for offering me the opportunity to speak to you in opposition to H.R. 2443.

H.R. 2443, the so-called Equitable Escheatment Act of 1993, is neither equitable nor about escheatments. If enacted, H.R. 2443 would endorse a raid on the Massachusetts Treasury potentially amounting to hundreds of millions of dollars, representing years of unclaimed property escheats, even though every dollar jeopardized by this legislation was collected in full compliance with law and without complaint or disagreement from any state. Furthermore, H.R. 2443 would set back the efforts of my staff -- and frankly, the staffs in many of the states whose members are co-sponsoring this legislation -- to return money to rightful owners. Indeed, H.R. 2443 will be a setback for returning property to rightful owners because it will substitute adversarial relationships for collaboration among unclaimed property administrators.

Finally, even if H.R. 2443 had any serious purpose other than to redistribute New York's liability in the ongoing litigation of Delaware v. New York, H.R. 2443 unfairly redistributes escheats from only one type of intangible property. If it is fair to ask Massachusetts, which has long cultivated the financial services industry as a commercial asset, to turn owner/unknown securities distributions it has lawfully collected to Texas, should not Texas also be asked to send Massachusetts a share of the distributions from owner/unknown oil and gas interests so important to Texas?

If I can, let me put to bed the issue of using Congress as a vehicle to settle the Delaware v. New York case. I am happy to advise you, as the Special Master was advised yesterday, that Massachusetts has negotiated in good faith with New York and our states have made great progress toward settlement. Subject to analysis of some numbers, we hope to announce final terms within two weeks. Based on our experience, I am confident that every other state can follow our example and reach a fair settlement with New York, and without involving Congress in the fashion that has occurred in this instance.

Now, let me turn to the issue of owner/unknown securities distributions and why H.R. 2443 is bad legislation.

Every year, hundreds of billions of dollars worth of securities transactions take place. This volume of business would be impossible without the services of financial intermediaries to hold securities and to record the transactions that take place. Like the small residue of shavings from the operations of large machines, a tiny fraction of these transactions result in accounting errors that either cannot be or are not corrected in time for interest and dividends to be reconciled with purchase and sales that have taken place. These funds -- the shavings, if you will, from the great volume of securities transactions -- escheat to the states.

My primary objective as the person ultimately responsible for administering the Massachusetts unclaimed property statute is to find the rightful owners of unclaimed property. In conjunction with the rising volume of securities transactions, my staff has become involved with industry and with unclaimed property administrators in other states in developing improved tracing of unclaimed funds. Since the financial services industry is so important to the Massachusetts economy, we think we have a special obligation to address unclaimed securities distributions.

Nonetheless, I will be the first to acknowledge that we are unlikely ever to develop a perfect system. Therefore, we do and we will take custody of unclaimed securities distributions -- but with this important caveat: We do so in accordance with all applicable legal principles, including rules of law established by the Supreme Court of the United States.

Since Massachusetts is home to many of the largest financial institutions in the world, unclaimed securities distributions have constituted much larger levels of reportable property in Massachusetts than in most other states. Yet, it is because Massachusetts has historically created the conditions for development of financial institutions -- and not because it has done anything unlawful -- that Massachusetts now finds itself exposed, under H.R. 2443, to a raid on its Treasury potentially reaching hundreds of millions of dollars. Such unfair consequences for Massachusetts arise solely because of the misguided attempt by many other states using H.R. 2443 as a blunt weapon to divert to themselves the estimated $300-400 million at stake in Delaware v. New York.

In essence, the background is this: the Supreme Court has long held that unclaimed intangible property is escheatable to the state in which the owner's last-known address is recorded. If the information available to the one holding the property does not identify the owner and last-known address, the property is escheatable to the state in which the holder is domiciled. In Texas v. New Jersey, 379 U.S. 674, 683 (1965), and in Pennsylvania v. New York, 407 U.S. 206, 211 (1972) (quoting Texas), the Supreme Court stated that this rule "is the fairest, is easy to apply, and in the long run will be the most generally acceptable to the States."

For many years, this rule was "generally acceptable to the States" because different states have different claims to different types of intangible property. For example, because Massachusetts is home to State Street Bank, Bank of Boston, Fidelity, Putnam and many other banks and financial services providers, unclaimed securities distributions may be more significant to Massachusetts than many other states. On the other hand, unclaimed royalties, working interest participations and revenue and other such interests in oil and gas properties are more significant to the oil patch states. As the Supreme Court pointed out, the traditional rule "tended 'to distribute escheats among the States in proportion of the commercial activities of their residents.'" Pennsylvania v. New York at 210 (quoting Texas v. New Jersey).

Consistent with the Supreme Court's holdings, for years Massachusetts and other states housing prominent financial institutions have taken custody of unclaimed securities distributions lacking owner/address identification. More to the point, all of the states pushing H.R. 2443 have known about the existence of owner unknown securities distributions for years -- certainly at least since unclaimed property administrators began professionalizing their offices and collaborating nationally on unclaimed property administration. They also were well aware of the applicable federal rule and how it affected them. There had never been any suggestion by the states now complaining about the traditional rule that states like Massachusetts should not be entitled to escheat owner unknown securities distributions from their own domiciliary financial services firms.

Ironically, it is the success of Delaware in the Supreme Court in obtaining a ruling reaffirming the Supreme Court's traditional rule that stimulated other states to cause H.R. 2443 to be filed. In Delaware v. New York, the evidence showed that New York had improperly collected owner unknown securities distributions from brokers domiciled in other states, primarily Delaware. To get their hands on the $300-400 million which New York collected improperly in previous years, the states seeking redistribution needed to find some means to establish a brand new legal right that would reach back in time and claim previously escheated owner unknown distributions. They therefore proposed that the traditional rule be overruled and a new rule be adopted that would retroactively look to the principal offices of the issuers of owner unknown securities distributions rather than the domicile of the holders.

The consequence of this reachback is not only to jeopardize Delaware's and, to a lesser extent, Massachusetts' rights to the $300-$400 million improperly collected by New York from Delaware and Massachusetts domiciliary financial services firms in violation of the traditional rule. Solely because of this retroactivity feature, H.R. 2443's reachback would also subject funds properly escheated to Massachusetts (and to New York) to disgorgement by transforming all escheats lawful under the traditional rule at the time they were taken into custody into suddenly and retroactively unlawful escheats under the new statutory rule.

Massachusetts believes that it is grossly unfair to adopt a special rule for one type of intangible property just because a number of states covet the cash New York owes Delaware and were unsuccessful in persuading the Supreme Court to abandon its traditional rule. If "equity" is really the issue, then all owner unknown unclaimed intangible property should be shared "equitably", including oil and gas interests, vendor payables, money orders, bank deposits, mineral and timber interests, crop futures, uncashed checks, and on and on.

Aside from the unfairness involved, the Act would create a costly Rube Goldberg scheme for redistributing otherwise properly escheated funds and would compromise years of effort by state unclaimed property administrators to rationalize interstate escheat claims against property and funds held in sister states. First, H.R. 2443 requires identification of issuers -- information that will necessitate approaching the former holders who have already turned their owner unknown distributions over to the state in which they are domiciled. These holders will then be required to reproduce their records to trace securities distributions, match them to specific issuers and then ascertain the location of the issuers' principal offices. Who will bear the cost and administrative burden imposed on them?

Laying aside the burden in time and money imposed on the reporting brokers, banks and unclaimed property administrators, any expectation that annual schedules of remittances issuer by issuer could actually be reliably reconstituted is pure fantasy. The more likely outcome will be contending schedules, factual disputes, and a field day -- or more accurately, years of field days -- for accountants and lawyers. Indeed, recognizing that matching distributions, issuers and locations of principal offices reliably will frequently not be possible, the drafters of H.R. 2443 have created yet another category of escheatable distributions -- so-called issuer unknown escheats. In this category, amounts disgorged under the retroactive application of the Act are supposed to be pooled and redistributed according to each state's proportionate entitlement to issuer known escheats. Of course, the drafters do not tell us when, and after how much litigation, it will be established which issuers are in fact unknown.

The problems with the proposed statute do not end there. Under H.R. 2443, states without unclaimed property statutes encompassing these new issuer known and issuer unknown categories can at any time amend their statutes and reach back as far as they wish. In that event, they would be entitled to a share of escheats, apparently even if the disgorgements and redistributions contemplated by the Act had already occurred.

The Act, in short, would be an administrative disaster. Theoretically, each of the fifty states would have retroactive claims against the other forty-nine. To be sure, not every state will pursue its claims, and certainly not against every other state. Nonetheless, the number of these cross-claims will be substantial, and in the case of states like Massachusetts facing potentially serious fiscal harm, litigation over how much is owed and to whom will surely be intense. Furthermore, although Delaware, New York and Massachusetts are the intended victims of H.R. 2443, states that are home to large banks and brokerage firms such as California, Texas and Illinois are more exposed than members of their Congressional delegations probably realize. When these states discover how much money they risk being forced to surrender, and the costs of protecting funds already escheated to them, the level of interstate squabbling will at last begin to focus attention on the real effects of this bill.

Other than the obvious attraction to the states supporting H.R. 2443 of capturing what looks like easy money by legislatively preempting Delaware's and Massachusetts' rightful claims against New York, I believe that many unclaimed property administrators in these states do not support H.R. 2443. The professionalization of our respective offices has led to reciprocal agreements for auditing cross-border escheatments, much cooperation in collecting unclaimed property and, when possible, finding the actual owners. H.R. 2443 will convert cooperation into adversary relations and retard the progress of recent years.

Finally, I think that we should recognize that deeper principles are involved here. I question whether the Congress should be intervening to upset the progress of pending litigation, particularly when there is no apparent public benefit in the form of better administration of unclaimed property statutes or improved identification of lost owners. Furthermore, I do think that legitimate Constitutional questions arise in a case such as this when legislation simply transfers money from one state that has acted perfectly lawfully to many others just because, in Congress, the majority rules.

Thank you for your attention.

STATEMENT OF JEREMIAH O'CONNELL AND HOWARD SPINDEL
U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS SUPERVISION, REGULATION AND DEPOSIT INSURANCE
H.R. 2443 (March 22, 1994)

Mr. Chairman and Members of the Committee:

Thank you for providing us the opportunity to appear before you today to discuss the role of financial intermediaries, the origin of unclaimed securities distributions and the ability of the securities and banking industry to implement H.R. 2443. Together, we have more than 50 years experience in the industry, are on the faculty of the New York Institute of Finance, and are particularly expert in how dividends, interest payments and other distributions are processed by banks, brokerage firms and depositories. Drawing on our knowledge of securities processing, we carefully analyzed H.R. 2443, and each of us has independently concluded that the legislation could readily be implemented in a cost effective manner.

Personal Background

A. Jeremiah O'Connell

I am the founder and President of Jeremiah Associates, an independent firm that provides management and technology consulting to the financial services industry. Much of my firm's work has centered on securities processing and the computer systems required to support the securities industry in the present and the future. On behalf of brokerage firms and banks, I have analyzed and designed both manual and automated systems to

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support securities trading, settlement, safekeeping and custody, and have worked on projects involving system requirements analysis, as well as system design, development and implementation.

Before founding Jeremiah Associates in 1985, I worked for brokerage firms for more than 15 years. At those firms I held various positions with responsibilities for securities processing operations and information services support for the full range of securities trading and settlement functions. Included among those functions was tracking and overseeing the receipt and payment of dividends and interest on securities as to which the brokerage firms acted as intermediaries on behalf of their customers, the beneficial owners.

For many years, I worked at a predecessor firm of Smith Barney Shearson, during which time the firm merged with and/or acquired a number of brokerage firms. Each merger/acquisition required the consolidation of securities processing operations and systems conversions. This experience provided me with a unique insight on how various firms supported their trading and inventory activities from an operations and systems perspective. My role and responsibility expanded with successive mergers and I had opportunities to lend my expertise in establishing successful, efficient securities processing operations.

I later transferred to the information services area of Shearson, which allowed me to expand my scope of expertise and contribute my business experience in the development of systems to support trading and settlement activities. Project experience included the redesign of trading, clearance, settlement and custody/safekeeping systems.

In addition to being President of Jeremiah Associates, I am on the faculty of the New York Institute of Finance, where I teach courses and seminars on Securities Operations Procedures and Global Securities Services, both of which include systems requirements for securities processing.

Based upon my experience in and with the securities industry, I am thoroughly familiar with the industry's computer hardware, software and data processing capabilities, and its ability to process the data necessary to comply with H.R. 2443.

B. Howard Spindel

I am the Executive Vice President and one of the founders of Integrated Management Solutions (IMS), an independent firm that provides management consulting and other services to the securities industry. At IMS, I handle and consult on various aspects of broker-dealer activities including finance, operations and regulatory compliance. In conjunction with my work for IMS, I serve as the Financial and Operations Principal of several brokerage firms. In that capacity, I am directly responsible for their recordkeeping and reporting obligations that are imposed by regulators, taxing authorities and others.

Prior to founding IMS, I did extensive work in the so-called "back office" or operations side of the securities industry, which handles the processing of securities trading and distribution payments. From 1982 to 1985, I was an operations partner of Greenfield Partners, a company that cleared securities arbitrage transactions for its own account. Many of the transactions involved securities where there were significant amounts of dividend and interest payments.

I also gained significant experience in understanding the operational aspects of securities firms in my earlier positions as financial and operations partner at S.B. Lewis & Company, a New York Stock Exchange (NYSE) member firm specializing in arbitrage and mergers and acquisitions; as comptroller of Wm. D. Mayer & Co., a NYSE member firm specializing in options trading; and as manager of the Capital and Operational Standards Section of the NYSE's Regulation and Surveillance Group.

I am a member of the American Institute of Certified Public Accountants and the New York State Society of Certified Public Accountants, where I have served on its Stock Brokerage Accounting Committee. I am also on the faculty of the New York Institute of Finance, where I teach courses in Stock Brokerage Accounting and related regulations.

Role Of Financial Intermediaries And Causes
Of Owner-Unknown Unclaimed Securities Distributions

Before discussing the various mechanisms by which the securities and banking industry can comply with H.R. 2443, permit us to provide a brief overview of the role of banks, brokerage firms and depositories in the transmission of securities distributions and how they come to hold owner-unknown unclaimed securities distributions. Given our backgrounds in the industry, we would be the last people to assert that the industry is ineffective at processing the payment of dividends, interest and other distributions. Effective as the system is 99% of time, however, there is inevitably a small amount of slippage (which adds up to a substantial amount in the aggregate). This legislation determines which States are entitled to escheat that small percentage of distributions that becomes "stuck" in the hands of intermediaries that do not know to whom the distributions should be transmitted.

To facilitate the efficient receipt, delivery and custodianship of securities, intermediaries have been interposed between the issuers of securities and their beneficial owners. As a consequence, when cash and stock dividends, interest and other payments by issuers of corporate and governmental securities are made, the ultimate recipients of those distributions (the beneficial owners) typically receive their payments only after they have passed through the intermediaries.

Thus, for example, if the record owner of a security is a depository (such as the Depository Trust Company), the depository, after receiving the funds from the issuer's paying agent, passes the distributions on to its participating banks and brokerage firms, which in turn pass them on to their customers -- the beneficial owners -- or to other intermediaries, which in turn pass them on to their customers. If the record owner is a bank or brokerage firm, it receives the dividend or interest payment directly from the issuer's paying agent and then remits the payment to the beneficial owner or to another intermediary.

Intermediaries hold most securities because most beneficial owners -- like you and we -- simply do not want to be bothered with receiving actual stock certificates or bonds, storing them in safety deposit boxes and then retrieving them when they choose to sell the stock or bond. When an intermediary is the record owner of, for example, one million shares of IBM stock -- on behalf of 5,000 beneficial owners -- it will receive a single dividend check from IBM; and IBM does not know the number or identity of the beneficial owners.

There are two principal reasons why the distributions become "stuck" at banks, brokerage firms and depositories in the course of transmission to the beneficial owners. The first is errors. For example, a bank, brokerage firm or depository may miscalculate its customers' or participants' positions in a security, or use the wrong rate in calculating what it expected to receive on a distribution. Given the high volume of trading, it is inevitable that some errors occur.

Second, intermediaries sometimes receive more funds than they anticipated because certificates are not reregistered out of their name in a timely fashion. For example, let us assume that a customer of a brokerage firm sells a security that is registered in the broker's name. Upon settlement of the trade, the selling customer's broker may deliver a certificate still registered in its name to the purchasing customer's broker. If the certificate is not reregistered to reflect the new record ownership before the record date, the selling customer's broker will receive the distribution even though it did not expect to receive it. This cause of unclaimed distributions is sometimes called "missed transfer" or "float."

Intermediaries that receive these overpayments or overages almost without exception know the identity of the issuer of the security on which the distribution was paid, as well as other identifying information about the particular issue (such as, for example, its CUSIP number, which we will discuss later). Meticulously maintaining that information is necessary for their internal systems processing.

We have been asked to comment on what steps the securities industry might take to reduce the amount of overages paid in the future. Human error will prevent the industry from ever eliminating the problem altogether. Measures can and have been taken, however, to reduce the risk of certificates not being reregistered in a timely fashion. First, fewer and fewer securities holdings are evidenced by physical certificates. A growing number are held by depositories that provide "book-entry" movement in securities; the brokerage firms' and banks' balances are credited or debited when securities are sold but no physical certificate movement takes place. Second, the industry increasingly uses centralized clearing organizations which, by computer, compare, clear and settle trades between member brokerage firms and banks. This simplifies the settlement of trades made through book-entry movements. Notwithstanding these developments, however, the amount of overages that has accrued in recent years and that will continue to accrue in future years remains significant.

Implementation Of H.R. 2443

For many reasons, we have concluded that the securities and banking industry can readily implement H.R. 2443. The industry is extremely advanced technologically, as it must be to process the trading of tens of billions of shares annually. Banks, brokerage firms and depositories have highly sophisticated computer systems that are constantly being upgraded. To say that the industry would have difficulty reporting and remitting owner-unknown unclaimed securities distributions to the States of the principal executive offices of the issuers of the securities on which the distributions were paid is to blink at reality.

A. Factors That Limit The Impact Of H.R. 2443 On The Securities And Banking Industry

Two preliminary factors limit the impact H.R. 2443 will have on the securities and banking industry. First, brokerage firms and banks currently turn over unclaimed securities distributions as to which there exists a last-known address of the owner to the State of that last-known address. Thus, brokerage firms and banks already track and comply with the requirements of each State's unclaimed property laws.

Moreover, to comply with those laws, many banks and brokerage firms use outside vendors such as the Clearinghouse Reporting Service and the National Abandoned Property Processing Company that prepare and oversee the reporting and remitting of unclaimed securities distributions. These vendors have extensive experience and familiarity with each State's unclaimed property laws. Just as they currently assist brokerage firm and bank compliance with respect to owner-known distributions, they can assist brokerage firms and banks with respect to owner-unknown distributions.

Second, for two reasons, the number of intermediaries that will be affected by H.R. 2443 is small.

(1) While the National Association of Securities Dealers (NASD) currently has about 5,200 member brokerage firms, only about 10% of those are "clearing firms," and fewer than a third of the clearing firms (about 175) are regulated by the NYSE.

These NYSE clearing firms account for more than 90% of the securities held by broker-dealers. Clearing firms are firms that clear for themselves and have the operational and systems infrastructure in place or available to them to efficiently process securities transactions, maintain securities inventory and provide securities safekeeping and custody for clients. Such clients include not only institutional and retail clients, but also other brokerage firms that do not clear for themselves. Consequently, the potential number of firms that could be impacted by H.R. 2443 is reduced from the total NASD membership to those several hundred clearing firms. Moreover, the even smaller number of clearing firms regulated by the NYSE carry the vast bulk of customer securities. Likewise, a limited number of large banks process securities transactions -- such as the execution of trades, and trust and custody activities -- on behalf of the majority of other banks.

(2) Many clearing firms and banks do not use their own systems to process and support securities activities for themselves or for those firms on whose behalf they provide clearing services. They instead utilize service bureaus that furnish the data processing facilities and support -- including computer systems -- for securities processing. This eliminates the need for those brokerage firms and banks to underwrite the cost of developing and maintaining the software and associated hardware required for securities processing. The five major service bureaus currently providing this service are Automatic

Data Processing (ADP), BETA, Phase 3/Sungard, Vista Concepts and Warrington/Sungard.

ADP is the largest service bureau, processing 20% of all listed trades processed for brokers in the United States; Vista Concepts and Warrington/Sungard process most of the trust and custody activity for the money center banks; and Beta and Phase 3/Sungard process, collectively, more than 100,000 trades daily. While the service bureaus report their respective market shares using different measures, we estimate that they do the processing for the majority of clearing firms and banks. The many brokerage firms and banks that utilize the service bureaus or their software would not have to make any change to their systems to implement H.R. 2443; the service bureaus -- which provide the data underlying brokerage firm and bank unclaimed property reports -- would effect the change for their entire client bases.

B. Mechanisms For Determining <u>Issuers' Principal Executive Offices</u>

Through at least three methods, the location of the principal executive offices of issuers of securities can readily be identified by both service bureaus and those intermediaries that process their securities distributions internally. Please bear in mind that, with rare exception, the State of the principal executive offices of publicly-traded companies that pay distributions is identified in forms they are required to file with the SEC. And the State of the principal executive offices of State and municipal issuers can easily be identified and cannot be subject to dispute. Also bear in mind that the securities industry spends immense sums every year -- estimated for brokerage firms alone at $3 billion annually -- maintaining and enhancing their computer systems. Any incremental cost in upgrading the systems for purposes of implementing H.R. 2443 would be negligible and less than annual changes to conform to our ever changing securities regulations and tax laws.

To comply with H.R. 2443, the securities and banking industry will be assisted by the near universal use of CUSIP numbers, which identify each separate and distinct issuer and all outstanding issues of that issuer.[1] CUSIP numbers have been integrated into the internal and service bureau support systems of all brokerage firms and banks. This is due to the fact that in order to participate in industry service organizations, all domestic securities must be identified through the use of a CUSIP number.

Alternative ways through which intermediaries can comply with H.R. 2443 are set forth below.

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[1] CUSIP is an acronym for Committee on Uniform Security Identification Procedures, a service of the American Bankers Association. CUSIP numbers are an industry standard: used and required by the Securities Industry Automation Corporation (the data processing arm of the New York and American Stock Exchanges), other financial services organizations such as the National Securities Clearing Corporation and the Depository Trust Company, and companies that provide securities-related data, such as Interactive Data Corp. and Telekurs (North America) Inc.

(1) As described in the Statement of Randolph E. Hock, of DIALOG Information Services, Inc., among the information maintained on computer databases operated by Standard & Poor's, Disclosure and other firms is the principal executive offices of issuers of securities. These databases are currently used on-line by brokerage firms and banks for many different aspects of their financial services activities. Clearing firms, banks and service bureaus could retrieve on an on-line basis -- through searches or computer link based on issuer name or CUSIP number -- principal executive offices information from these databases in order to fulfill their reporting obligations. Under this method, the computer database is asked to retrieve principal executive offices information only as to the issuers of owner-unknown distributions (rather than as to all issuers of distributions).

(2) Clearing firms, banks and service bureaus could add the principal executive offices of issuers to their securities databases. Through their software systems, clearing firms, banks and service bureaus can establish a computer link between CUSIP numbers and the principal executive offices of issuers. The needed information can be obtained by, among other means, downloading principal executive offices information from databases or purchasing databases on compact disc. Clearing firms, banks and service bureaus would make concomitant one-time modifications to their systems to make room for the data and permit its acceptance, application and maintenance. The cost of making this link would be a negligible percentage of an

intermediary's computer budget, and, as noted, is no different than the cost of intermediaries complying with the frequent changes in securities regulations and tax laws.

Maintaining a current list of principal executive offices when, for example, an issuer changes that location is a simple task. Such a change is database related and would be processed within the definition of normal security/issuer changes such as dividend announcements, daily price changes, and exchange listing and delisting activities. Again, this data and changes to it are available on-line from organizations such as Standard & Poor's. And the same data might be used for other purposes, if desired. We are confident that even more companies will be compiling this information for the securities industry if there is a need for it.

(3) The securities industry has begun developing an industry-wide database to provide a repository of securities level information to the entire securities industry. Specifications are currently being determined, outlining the content and definition of the information that will be included in this repository. The principal executive offices of issuers can easily be incorporated into this database and be provided to industry participants within the regular methods of retrieving securities related data.

Conclusion

The deciding factor as to how precisely to comply with the legislation would be determined by each intermediary based upon its unique needs and the alternative most appropriate for a particular situation. We are fully confident that whichever mechanism is chosen will not be burdensome and can readily be implemented in a cost-effective manner by the highly computerized, sophisticated securities and banking industry.

For many reasons, therefore, brokerage firms and banks can readily and cost effectively comply with H.R. 2443.

-- They already track and comply with the unclaimed property laws of each State with respect to owner-known property;

-- they are assisted in complying with unclaimed property laws by outside vendors expert in those laws;

-- only a small minority of brokerage firms and banks clear securities transactions and would therefore be affected by the legislation;

-- many clearing firms and banks use service bureaus to process transactions, further reducing the number of companies that would have to adjust to the legislation;

-- through databases currently used by the securities and banking industry, clearing firms, banks and service bureaus have ready access to principal executive offices information; and

-- the securities and banking industry is extremely advanced technologically, and are well-equipped to accommodate the legislation.

These views apply equally to S. 1715.

Thank you for the opportunity to appear before such a distinguished Committee.

STATEMENT OF THOMAS R. TREMAINE SUBMITTED TO THE FINANCIAL INSTITUTIONS SUPERVISION, REGULATION, AND DEPOSIT INSURANCE SUBCOMMITTEE OF THE HOUSE BANKING COMMITTEE CONCERNING H.R. 2443, THE EQUITABLE ESCHEATMENT ACT OF 1993

On behalf of the Securities Industry Association, I submit this statement to address our concerns about the proposed legislation and its impact upon brokerage firms around the country. We have also been consulting with our counterparts in the banking industry and know that they share our concerns. The information that has been disseminated by the proponents of H.R. 2443 presents the legislation as if it clearly benefits 47 states, only harms three states, and has insignificant consequences for the affected holders of abandoned property as well as for the owners of such property. Examination of these assumptions reveals that they are inaccurate and misleading. Unlike some of the testimony that has been submitted, we think there is a serious question as to whether any of these three groups -- the states, the holders of property, and the owners of the property -- can be said to be benefited more than they are hurt by this bill. In two cases -- the financial institutions and the individual investors -- we believe that the impact is going to be uniformly negative.

<u>Summary</u>

I would like to comment upon the following issues that we believe are raised by H.R. 2443:

- The effect of H.R. 2443 on owners of abandoned property will be to make it more difficult for them to locate their lost property.

- The effect of H.R. 2443 upon financial institutions would be burdensome and expensive, because it would dramatically change the way in which brokerage firms and banks comply with state escheat laws.
- The effect of H.R. 2443 on the various states is impossible to predict, but it is clear that the bill would not uniformly benefit those states that are now the proponents of the bill. The bill would likely generate interstate conflicts, including the possibility of conflicting claims to the same property and efforts by states to audit each other.

Background

Let us start by acknowledging that there are two different types of abandoned property that are subject to escheat. However, only one type is the subject of the proposed legislation. The first type of abandoned property is where the financial institution has a record of the last known address of the customer. This type of property is subject to the escheat laws of the state of the customer's last known address. Essentially, the reasons for using the state of the customer's last known address are twofold: first, it is the most logical and easiest way for a customer to come back to find and reclaim the property. Second, the state of the customer's last known address is most probably where they earned the income that enabled them to purchase the property. Therefore, the benefit they received from that state would be returned to it. This type of abandoned property accounts for the vast majority of property escheated to the states and is unaffected by the proposed bill.

It is the second type of abandoned property which is the subject of the Equitable Escheatment Act. This property cannot be traced to a particular account or customer and is commonly referred to as "owner unknown" property. In fact, "owner unknown" is not exactly correct, as most of this property belongs to the financial institutions themselves, but, in individual amounts, the property is too costly for firms to track down and claim. This owner unknown property often comes about because it becomes lost in the process of transferring ownership of securities between one financial institution to another. Dividends, interest and other payments made by issuers are payable to the owner of the security on certain dates, known as the record date. Because of delays in transferring ownership of securities, through error or inherent delays in the financial system, ownership changes may not be recorded prior to the record date. Because the previous financial institution is still listed on the issuer's records as the owner on the record date, that institution would receive the payment of the distribution from the issuer which should have been paid to the purchasing financial institution. If the institution that received the payment but is not entitled to it does not have a record of whom it really belonged to, the payment would become unknown owner abandoned property.

The Effect of H.R. 2443 on the Financial Services Industry

The most direct and readily ascertainable effects of the legislation will fall upon the brokerage firms and other financial institutions that will have to comply with this proposal. If the bill becomes law, the burden of compliance for financial institutions would become substantially more complicated, more time-consuming, and more costly. Most of the approximately 6,000 brokerage firms in this country do business in only a few states. In order to do business with customers in a particular state, a brokerage firm must register with the securities regulator in that state. Because of this, these small firms that have undertaken their own abandoned property law compliance have only needed to comply with the abandoned property laws in the limited number of states in which they did business. Similarly, small banks and trust companies generally conduct business in a very localized area, because of legal restrictions on interstate banking. All of these companies have generally not had to assume the burden of complying with the abandoned property laws of distant states for unknown owner property. Even very large brokerage firms and banks, while they may have been required to escheat unclaimed customer accounts to states all over the country, have never had to analyze and break down their unknown owner property for escheat to multiple states.

Currently, firms that hold the kind of property that this bill would affect simply generate a list of unclaimed property on an annual basis. They submit this list to the abandoned property office in the broker's or bank's state of incorporation, and then transfer the property in a single transaction to that state. It is a relatively simple, mechanical operation.

Under H.R. 2443, many brokerage firms and banks would have to become familiar with the abandoned property statutes of every single state. This could increase their reporting of unknown owner property 50-fold. Many states have different holding periods for unclaimed property, different deadlines throughout the calendar year when reports must be filed, and different formats and information requirements for unclaimed property reports. The reporting process would no longer be routine and mechanical, but would require continual administrative intervention and the exercise of judgment about how to handle items the dollar value of which is very small.

Firms would be required to analyze their abandoned property accounts and determine, for each of thousands of very small items, who the issuer of the security that generated the item is. The firm would then have to determine the location of the issuer's principal executive offices at the time the distribution was made, even though those offices may have changed location in the interim. The firm would then have to formulate an abandoned property report that complies with the requirements of that particular state, and determine when the and where the report has to be filed, and where and how to transfer the funds. The firm would have to do this for hundreds of thousands of issues of securities and for 50 individual states plus the District of Columbia. In addition, the firm would have to monitor the laws of all these jurisdictions to ascertain changes in those laws.

The burden and importance of this compliance is significant. In the past, a firm that did not properly comply with its abandoned property law obligations was likely to be at risk of audit, with possible interest charges and penalties for non-compliance, from one state -- its state of incorporation. The bill would now subject brokerage firms and banks to potential audits, claims, interest charges, and penalties from all 50 states and the District of Columbia, including states where the firm has never done business and from which it derives no benefits. No firm can afford to take this very real possibility lightly.

In order to comply with this legislation, financial firms' computer systems, assuming they have such systems to track abandoned property, would need to be restructured to keep track of the states of principal executive offices of the issuers of literally hundreds of thousands of issues of securities. Systems for dividend and interest processing do not now record such information. It is a piece of data that has never been kept track of by brokers or banks in connection with dividend or interest processing because there was no reason to do so. Such software modifications would be expensive for a small firm and difficult to implement -- it would require them to reconfigure their databases (which may already be overloaded) to keep track of a new category of information. Furthermore, those systems would require constant updating, because corporate issuers may change the location of their principal executive offices or merge with other companies.

It is important to recognize the role of computerization in this process. It has been suggested that because of the financial firms' familiarity with and reliance upon computer systems, the retooling of those systems to accommodate this radical change in the law would be an insignificant burden. We do not believe this to be the case. Large financial firms do indeed rely heavily upon dataprocessing and information retrieval systems of various kinds, but those systems are designed, at enormous cost, to perform specific functions. While it may be the case that a national brokerage firm or a large bank might have a system for use by its investment bankers that might contain current information on the location of an issuer's executive offices, it is extremely unlikely that the system tracks historical changes in the location of executive offices of issuers. It is even more unlikely that the system is the same one as is used by the back-office operations clerks who handle processing of dividend and interest payments. For smaller firms, information as to the location of issuers' executive offices may simply be unavailable, unless the person assigned to process abandoned property accounts obtains hard-copy SEC filings and manually looks up the information on each item -- which does not address the problem of an issuer's having changed its executive offices since the payment date for the distribution.

The problem of issuers changing the location of their executive offices is a substantial one. The location of executive offices of an issuer do not necessarily represent the location where the issuer's primary commitment of capital, its employees, its factories, or other facilities are located. Instead, the executive offices are often chosen for reasons of executive life-style, cost, or even weather, and they may change for any of those reasons. This fact highlights the illogic of the proposed change in the escheat law, which determines which state an unclaimed distribution will escheat to based upon where the issuer's executive offices were at the time the distribution was made. For example, a dividend distribution for American Home Products (which changed its principal executive offices from New York to Texas in 1993) that was paid to a financial institution in 1993 and remained unclaimed would have to be escheated to a different state from an identical distribution paid by the same issuer in 1994. If the financial institutions' records did not reflect this change of offices, and thus it escheated the later distribution to the wrong state, it could be subject to audit, interest, and penalties for having made that mistake.

Burden Upon Financial Institutions

A comparison between the law as articulated by the Supreme Court and the consequences of H.R. 2443 speaks for itself on the issue of burden:

Current Law

- One report for unknown distributions is filed each year with the state of incorporation of the financial institution.
- The financial institution possesses all information necessary to file the report.
- One holding period applies to all unclaimed distributions received in a single year.
- One type of report needs to be filled out for unclaimed distributions.
- One filing date for the report.
- One state to receive the escheated property.
- One state with authority to audit or impose interest and penalties.

Proposed Law

- The financial institution would be required to file reports with all 50 states and the District of Columbia.
- The financial institution needs to obtain additional information to prepare the report.

- Different holding periods would apply for unclaimed distributions received in a single year.
- Different report formats are required for different states.
- Different states require different filing dates.
- 51 recipients to receive the escheated property.
- 51 different regulators with authority to audit or impose interest and penalties.

The only supposed solution that anyone has proffered to the administrative burden that is undeniably inherent in this legislation is the use of a third party service to provide the necessary information or even to take over the financial institutions' abandoned property law compliance. The costs of this approach have yet to be analyzed, but the payments can come from one of only two sources: the financial institutions that have the burden of escheat law compliance, or the abandoned property itself. We believe that the first alternative is grossly inequitable, while the second would reduce the amount of abandoned property available to any state. Neither of these sources should have to direct payments to private-sector service providers to alleviate the burden that the legislation will inevitably impose. These service-providers are the only clear beneficiaries of H.R. 2443.

The Effect of H.R. 2443 on the Owners of the Property

It is important to understand who the owners of the unknown owner property really are. It is standard practice in the securities industry that customers virtually always receive the payment of dividends or interest that they are entitled to if they were the owner of the security on the record date, regardless of whether the financial institution has received the dividend or interest payment from the issuer. It is up to the financial institutions to research where the payment actually went and to claim it. Often, however, these payments are small enough in size that firms do not find it cost effective to track them down. The abandoned property is then subject to escheat to the holding financial institution's state of incorporation. But even in the situation where a customer's property becomes "owner unknown" and is turned over to the financial institution's state of incorporation, it is then possible to recover the abandoned property without extreme difficulty, because the customer knows who his broker is and can easily find out its state of incorporation.

If the item of unknown owner abandoned property is actually owned by an individual investor, then the effect of this proposed legislation is to undermine the basic purpose of abandoned property laws, which was to make it easier for the public to find their lost property. The effect of this law is to make it much harder for the individual investor, who would have to track down the state of the principal executive offices of the issuer of the security that he owned. This is compounded by the fact that these offices change and that the relevant location under the proposed legislation is where those offices were located at the time the issuer made the payment, not the current location of those offices. This is not the kind of information that a typical customer would keep track of about his or her investments, and it is not the kind of burden that the law should impose upon those customers. Moreover, the effect of H.R. 2443 would be to make it much more difficult for financial institutions to assert claims to recover erroneously escheated property -- on behalf of customers or themselves -- because they no longer could file claims with a single state regardless of the location of the issuer of the security.

The number of distributions that go astray is a minute fraction of all distributions -- estimated in the report of the Special Master to the Supreme Court to be less than .02 percent (two ten-thousandths) of the entire amount. In the overwhelming majority of cases, the property in question belongs to financial institutions, who are simply unable to locate these unclaimed items because of the glitches that occur in the processing of securities distributions. Thus, these firms have, in a sense, already made substantial contributions to the fiscal health of the states generally by virtue of their unintended, but thus far unavoidable, inability to develop errorless systems for securities processing. We believe that to make those systems more complicated would be a step in the wrong direction and would impede the objective of reuniting owners with their property.

The Effect of H.R. 2443 on the States

It is also important to understand what is known, or not known, about the effect of the bill on the states, including the many states that up to now have been supporting this legislation. The legislation has been presented as helping 47 states and hurting three. We would like the members of this subcommittee to understand the complexity of the issues affecting which states will be hurt and which helped.

Under the proposal, the ability of a state to escheat would be based on the location of the executive offices of the issuer of a security at the time it makes a particular distribution. This location is something that corporations can, and do, change all the time. This leads to the possibility that in the future, the 47 states that have been presented as the beneficiaries of this bill will be spending state taxpayer dollars defending claims brought by other states. States may well be fighting over the escheated funds and auditing their sister states in disputes about where and when a particular corporation had it principal executive offices.

Moreover, the bill provides for full retroactivity, which means that the states are going to be asserting claims against each other to prove that the principal executive offices of a corporation were in that state at the time an escheated distribution was paid. We are not in a position to predict which states will ultimately be the winners or the losers, but it is clear that nobody else knows with any certainty either which states, if any, will be beneficiaries. This kind of information, relating to the location of issuers' executive offices, has never been monitored before, because this bill represents a complete change in the law. There may be some states that might get a windfall, but there is insufficient information to predict who that might be with any degree of accuracy, and the potential downside from cost of interstate audits, claims, and litigation simply cannot be estimated.

The retroactivity of H.R. 2443 would substantially aggravate this problem, not only for the states but for the financial institutions that have previously complied with the state escheat laws as they currently stand. The bill puts each state clearly and intentionally at risk of claims asserted by other states -- that is part of the purpose of the legislation. Also at risk, however, are the institutions who may be perceived as having records that might assist any state in its claim against another. The prospect of financial institutions being forced, through audit or subpoena, to dredge up records, if they are even retrievable, relating to amounts escheated many years before confirms the inequity of this bill.

In conclusion, this bill would create an unreasonable and costly administrative burden for financial institutions and would even hurt the investing public, while the benefit for the various states is doubtful, but simply cannot be evaluated at this point in time.

Statement of Professor Sanford V. Levinson
and Professor Lucas A. Powe, Jr.
of the University of Texas School of Law,
Before the Financial Institutions Supervision,
Regulation and Deposit Insurance Subcommittee of
the House Committee on Banking, Housing and Urban Affairs
on H.R. 2443, The Equitable Escheatment Act
April 11, 1994

H.R. 2443 and S. 1715 Are Constitutional

We are Constitutional Law professors at The University of Texas who between us have taught -- and written about -- constitutional law for over 35 years. (Attached as Exhibits A and B are copies of our respective curriculum vitae.) At the request of the States of California and Texas, we have analyzed the constitutional objections raised by opponents of H.R. 2443 and S. 1715. We have concluded that those objections are based upon an outmoded and crabbed interpretation of Congressional power, one wholly inconsistent with Supreme Court precedents for at least the past fifty years. Both the prospective and retroactive provisions of the legislation are constitutional.

I. Background

A standard financial practice is to leave securities and other financial instruments that in economic fact are purchased by individuals in the "street name" of the financial institution that arranges for the purchase in the relevant market. This means, among other things, that dividends, interest, and other assets are distributed to these institutions, which then pass them along to the beneficial owners as recorded in the institution's records. Inevitably, some of these assets remain in the hands of the institutions because records do not exist regarding to whom they should be sent. At some point these assets are treated as "abandoned property" subject to seizure by the State under the doctrine of "escheat." The question is, which State is entitled to take custody of these funds? New York, Delaware and Massachusetts assert that it should be the State of the financial institution holding the distributions. Almost all other States support a rule which would allow the States in which the issuing companies have their principal executive offices (as distinguished from where they are incorporated) to escheat the funds which have become stuck in the distribution network between the issuing company and the now unknown person or entity who should have received them.

Invoking the original jurisdiction of the United States Supreme Court, Delaware filed suit against New York, which had escheated a substantial amount of "owner unknown" distributions in violation of the rule New York now supports. A Special Master appointed by the Court, the distinguished legal academic and former Dean of the University of Virginia Law School Thomas Jackson, was charged with the duty of taking evidence and recommending a solution. After full consideration of such evidence and briefing by all affected parties, Dean Jackson issued a recommendation supported by the overwhelming majority of States: He proposed as the backup procedure -- to apply where the identity (or address) of the ultimate beneficiary is unknown

-- escheat by the State in which the issuing company has its principal executive offices as determined by filings submitted to the Securities and Exchange Commission.

In Delaware v. New York, 113 S.Ct. 1550 (1993), however, a divided Supreme Court chose to reject the Special Master's report, and instead, by emphasizing technicalities of State commercial law, adopted a backup rule that allows escheat by the State in which the intermediary institution is incorporated. New York and Delaware are the major beneficiaries of the Court's decision. The remaining States (save for Massachusetts), justifiably upset at this Court-created windfall for New York and Delaware, have exercised their right to petition Congress to change the rule in a more equitable direction.

There is ample precedent for such action by Congress. Congress quickly reversed the result of Pennsylvania v. New York, 407 U.S. 206 (1972), which had given to the State in which Western Union was incorporated the right to escheat all undistributed money orders for which records of the address of the sender or recipient were lacking. Congress enacted 12 U.S.C. §§ 2501-2503, giving priority instead to the State in which a given transaction originated, i.e., to the State where originators of the funds placed them in the stream of interstate commerce. Like Justice Powell, who had dissented in Pennsylvania, Congress no doubt believed that it was unfair to allow the formality of incorporation to control the process of escheat. The constitutionality of this law, which was retroactive to funds not taken by a State back to 1965, has not been challenged. One could well think this question is settled, particularly since New York also opposed 12 U.S.C. §§ 2501-2503.

However, Professor John Gibbons has made the astonishing suggestion that Congress is without constitutional power to act upon the States' complaint in the instant case by passing H.R. 2443 or S. 1715, which would, along the lines of §§ 2501-2503, reverse a similarly unfair and formalistic decision of the Supreme Court. But for our deference to the position previously held by Professor Gibbons, as a distinguished member of the United States Court of Appeals for the Third Circuit, we would proclaim his suggestion "frivolous," for this is one of those relatively few times that the phrase "totally without merit" to refer to a constitutional argument is fully justified. It is well within Congress' power to overrule the decision in Delaware v. New York both prospectively and retroactively.

II. Discussion

A. Congress Has The Power To Engage In Prospective Overruling Of Federal Common Law As Enunciated By The Supreme Court And Enact The Special Master's Recommendations

One could well dispose of Professor Gibbons' suggestion merely by quoting the Court itself: "If the States are dissatisfied with the outcome of a particular case, they may air their grievances before Congress. That body may reallocate abandoned property among the States without regard to this Court's interstate escheat rules." 113 S. Ct. at 1562 (emphasis added). It is scarcely likely that the Court said this casually or without reflection. But it is worth returning to an earlier decision, Texas v. New Jersey, 379 U.S. 674 (1965), to understand why it is clear beyond any reasonable doubt that the Court was correct in reminding the losing States that they could petition Congress for relief.

Texas also involved a dispute among the States about common law rules of escheat, the details of which need not concern us. In resolving the dispute, the Court, through Justice Black, emphasized that it was relying "primarily on principles of fairness." 379 U.S. at 680. The penultimate paragraph of the opinion was as follows:

> We realize that this case could have been resolved otherwise, for the issue here is not controlled by statutory or constitutional provisions or by past decisiohs, nor is it entirely one of logic. It is fundamentally a question of ease of administration and of equity. We believe that the rule we adopt is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States. [Id. at 683 (emphasis added).]

Justice Black, who usually stood second to none in proclaiming the illegitimacy of the Court's reference to such "natural law" notions as "fairness" when interpreting the Constitution, fully realized that the Court in Texas (and similar cases) was acting entirely as a court of common, and not constitutional, law. The Court therefore had the traditional discretion accorded common-law courts presented with issues of first impression, as was basically the case in Texas, to act as a quasi-legislative institution and to promulgate what it believed to be sound public policy. There is not even a hint in the Texas opinion that the Court is acting in its regular mode as the "finder" of pre-existing law that it is duty-bound to enforce, regardless of the social policy consequences. And Justice Black's reference to "statutory provisions" suggests that Congress might well provide such a rule, though in its absence the Court was authorized to craft its own.

Indeed, there is at least one circumstance where even Constitution-based decisions are subject to "review" by Congress. That frequently occurs upon the exercise by the Supreme Court of its power under the so-called "dormant commerce clause" to assess the merits of State legislation that involves interstate commerce. As Professor Gibbons well recognizes (see his testimony at 9-10), it has been established at least since Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855), that Congress is free to "review" a decision of the Court and to change the rule announced therein, either by allowing the State to do what the Court had declared prohibited or by prohibiting what the Court had declared permissible. That is, altogether sensibly, the Court in Wheeling Bridge and many times thereafter has accepted the proposition that Congress has ultimate competence to judge the delicate balance among State and federal interests presented in the classic dormant commerce cases.

Justice Black in Texas and Justice Thomas in Delaware v. New York both recognized Congress' role in resolving interstate escheat disputes. States have conflicting interests in regard to the rules of escheat. The Constitution establishes original jurisdiction in the Supreme Court to adjudicate such disputes, given the constitutional inability of States to resolve them without recourse to some national institution. But, contrary to Professor Gibbons' suggestion, national resolution by Congress raises no issue under the 10th Amendment, for there is no transfer here of traditional State powers to the federal government. Instead Congress is simply deciding which among several contending states will be able to escheat the abandoned property. New York v. United States, 112 S.Ct. 2408 (1992), cited by Professor Gibbons, is simply irrelevant to the matter at hand.

There is no reason whatsoever to believe that the Court must have the "last word" in regard to the law of escheat any more than is the case in regard to the dormant commerce clause, where sensible functionalism, as opposed to sterile formalism, has served the country well. Alas, Professor Gibbons offers only the most sterile formalism to support his argument that Congress is prohibited from responding to the adoption by the Court of what Congress believes, like the Special Master and the three

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dissenters on the Court itself, to be thoroughly mistaken public policy.

Professor Gibbons argues what Justice Black explicitly denied, that the Constitution on its own selects which State, among many plausible contenders, will be the recipient of the funds subject to escheat. One might even concede that the Constitution places <u>some</u> limit upon a Congress determined to act irrationally, as by selecting a particular State without any connection at all to the funds in question to escheat them. But that is surely not the case here, where the States given authority to escheat are precisely those in which the fund-generating companies have their principal executive offices. Professor Gibbons' due process jurisdiction argument on this point is frivolous. It ignores reality to contend that a State lacks sufficient nexus with a broker or bank to recover interest paid by that State's taxpayers on bonds issued by that State which are held by that broker or bank (or sufficient contact to recover dividends paid by companies headquartered in that State). Relying on the interstate taxation cases and their complexities is wholly beside the point because with this legislation it is Congress, not the States, that sets the governing rule. It is inconceivable that anyone could regard such a permission to escheat as "irrational" or view the escheating States as lacking a relevant nexus with the escheated funds.

Justice Black was correct, in every respect, in his delineation of the legal realities surrounding the Court's choice of policies in cases involving States and escheat. No member of Congress should have the slightest doubt the H.R. 2443 and S. 1715 are unproblematically constitutional insofar as they reverse the rule adopted by the United States Supreme Court, sitting as a court of common law, in Delaware v. New York.

B. Congress Has The Power To Enact Legislation Applying To The Property In Dispute In Delaware v. New York

As has just been confirmed, it is fully within Congress' powers to settle disputes over interstate escheat and to do so regardless of the various characterizations in the laws of the several States or the resolution chosen by the Supreme Court in a case brought before it. In determining how to fashion a rule, Congress is, quite simply, free to do as it pleases, so long as its decision passes the due process rule of rationality. Furthermore, at least until a final judgment issues, there are no separation of powers problems with legislation upsetting the Court's determination.

There is no general constitutional bar to retroactive applications of civil laws. The Ex Post Facto Clause applies solely to criminal statutes. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Lindsey v. Washington, 301 U.S. 397 (1937). Thus the constitutionality of the retroactive sweep of civil laws is tested by the Due Process Clause. To pass that test legislation need only be rationally related to a legitimate government purpose. Pension Benefit Guarantee Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984). It has been over a half century since the last time retroactive economic legislation flunked the test and has been invalidated. See Andrew C. Weiler, Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws, 42 Duke L.J. 1069 (1993).

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), is illustrative of contemporary constitutional jurisprudence. Congress enacted legislation providing benefits to coal mine workers who contracted "black lung" disease. Mining companies had to pay benefits even to miners who had left the companies' employment prior to the enactment of the statute. This, the mining companies argued, was a wholly unexpected and therefore unconstitutional imposition of a liability. The Court acknowledged both that the companies may have been unaware of the dangers of 'black lung" disease and that previously-existing law imposed no liability on them. Nevertheless, the law was not unconstitutional simply "because it upsets otherwise settled expectations." Id. at 16. Because the cost-spreading plan by Congress was rational, the law, although retrospective, was constitutional. Id. at 19.

H.R. 2443 and S. 1715 are fully rational. No one can dispute that among the ways that unclaimed dividends can be escheated when the rightful owners cannot be found is by having the State of the issuing entity be the State entitled to the funds. Because the rule is rational, any limitations the Due Process Clause might impose on retroactive legislation are satisfied.

New York and Delaware, however, claim that their expectations to keep the owner-unknown unclaimed securities distributions at issue in the litigation have ripened into a judicially vested right which cannot be undone by legislation. The major fallacy with this position is that it assumes, contrary to fact, that there is a final judgment in Delaware v. New York. There is not, and accordingly, New York and Delaware do not yet have a vested right to the funds.

Ever since United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103, 110 (1801), the Supreme Court has held that when "a law intervenes and positively changes the rule which governs [a pending case], the law must be obeyed" by the judges. This basic rule continues to be the law of the land. Thus, in Robertson v. Seattle Audubon Society, 112 S. Ct. 1407 (1992), the Court sustained a statute that referred to two pending cases in its declaration that compliance with certain new statutory provisions must be deemed compliance with certain prior statutory provisions. Judge Easterbrook has aptly stated the rule in the area: "[i]n civil litigation, . . . no person has an absolute entitlement to the benefit of legal principles that prevailed at the time the case began, or even at the time of the bulk of the litigation." Tonya K. By Diane K. v. Board of Education of Chicago, 847 F.2d 1243, 1247 (7th Cir. 1988) (emphasis added).

Professor Gibbons attempted to avoid the rule of the Schooner Peggy by his argument that upsetting the judgment in Delaware v. New York would violate the separation of powers doctrine because it would place Congress in the position of an appellate tribunal. He assumes that the owner-unknown unclaimed securities distributions at issue "belong" to New York, Delaware and Massachusetts, but he never explains how they became the "property" of those three States. Indeed, Professor Gibbons was very careful to avoid talking specifics. Thus he carefully avoided articulating his central premise --- that there is a vested final judgment in the litigation. At one point in his testimony, he states that "an essential aspect of judicial action is finality." Professor Gibbons, however, failed to note that his basic premise -- that a final judgment has issued -- is factually incorrect.

If there were a final judgment, the rule of the Schooner Peggy would be inapplicable. But if there were a final judgment in Delaware v. New York, not only could it be xeroxed and shown to everyone, but New York and Delaware could also state how much money the judgment assigns to them. As the Supreme Court has explained, a final decision is one that "leaves nothing for the court to do but execute the judgment." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373 (1981).

The Supreme Court's decision remanded the litigation to the Special Master so that New York or "any other claimant State" may prove its entitlement to the funds under the primary escheat rule "on a transaction-by-transaction basis or [through] some other proper mechanism for ascertaining creditors' last known addresses." 113 S. Ct. at 1561. As a consequence, the Court's decision as to what backup rule should control the unclaimed distributions did little more than begin the process by which it will be determined how much of the money that New York has seized in the past will in fact be assigned to it.

Currently, discovery in the case is underway in regard to primary rule claims. Each and every distribution is subject to a claim under the primary rule that would trump the claims of New York, Delaware or Massachusetts under the Court's backup rule. After the discovery is completed, there will be hearings before the Special Master. The Special Master will issue a recommendation for the final disposition of the case, and intervening States can then file exceptions to that recommendation. Only after the Supreme Court deals with any such exceptions will there be a final judgment to the litigation. Furthermore, the Special Master has yet to decide the amount of funds New York must disgorge to each State under the backup rule should the primary rule claims not be successfully asserted. This recitation underscores the obvious: there is no final judgment in this matter. Under the circumstances, the rule of the Schooner Peggy applies and Congress may, if it deems it appropriate, change the rules for dividing the escheatable funds among the States.

In the interests of efficiency and completeness, we note that even if there were, contrary to fact, a final judgment, it is by no means clear that Congress would be barred from reversing it. This issue is being contested right now as the Supreme Court considers the case of Morgan Stanley & Co. v. Pacific Mutual Life Ins. Co., No. 93-609.

The Court granted certiorari to determine whether Congress, by enacting § 27A of the Securities and Exchange Act -- which overturned the Supreme Court's ruling in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), as to the limitation period for bringing suit -- violated either the separation of powers doctrine or unconstitutionally interfered with a judicially-vested right based on a final judgment. In his Brief to the Court, the Solicitor General, on behalf of the United States, endorsed the constitutionality of § 27A, contending that a judicially-vested right, even in the form of a final judgment, is no different from any other right; as noted over 100 years ago in Campbell v. Holt, 115 U.S. 620, 628 (1885), there is no special class of vested rights, and Congress could thus retroactively affect a final judgment.

As the Pacific Mutual case makes clear, it is open to debate whether there exists a bar on legislation overturning "final judgments." In the Pacific Mutual case, Petitioners rely on McCullough v. Virginia, 172 U.S. 102, 123-24 (1898), for the proposition that a final judgment creates vested rights that cannot be undone by legislation. Yet McCullough involved the Contract Clause and was one of a series of cases involving Virginia's efforts to default on bonds. The language suggesting final judgments are special was dictum by the Court, and we are unaware of any Supreme Court case holding that property acquired by a final judgment is granted any higher level of protection against legislative action than property generally. By contrast, we are aware of several cases where rights acquired by a final judgment have been divested by legislation.

The first, of course, is the famous Wheeling Bridge case, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851); 59 U.S. (18 How.) 421 (1855), where the Court held that a bridge across the Ohio River impermissibly obstructed the right to freely navigate the river (because the bridge was too low). Congress then passed legislation declaring that the bridge, as constructed, was lawful. Subsequently, the bridge collapsed and the same parties litigated again over whether the bridge could be rebuilt at its previous height. This time the Supreme Court concluded that the statute, rather than the final judgment between these parties, set the controlling height. The statute was valid, the Court held, despite the earlier adjudication, because it dealt with a public right -- the right of navigation. 59 U.S. at 431.

More recently, in Fleming v. Rhodes, 331 U.S. 100 (1947), final judgments of evictions during a lapse in federal price control legislation were subsequently overturned by new legislation. The landlords argued that "vested rights, created by the prior judgments . . . could not be destroyed by subsequent legislation." Id. at 102. The Court responded that "[s]o long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. . . . The rights acquired by judgments have no different standing." Id. at 107. This underscores our earlier conclusion that, tested by the Due Process Clause, any applications of the secondary distribution rule embodied in H.R. 2443 or S. 1715, prospective or retroactive, are consistent with the Constitution.[1]

There is a further point that should be addressed. Professor Gibbons argued that upsetting the Supreme Court's decision would be a violation of the principles of separation of powers. Recall that his argument presupposes a heretofore nonexistent final judgment in the Delaware v. New York litigation. Even if a final judgment issues, it is by no means

[1] We need not worry, of course, about how the Supreme Court will decide the Pacific Mutual case. If the Court sustains § 27A, then a fortiori, a retroactive application of H.R. 2443 or S. 1715 would be valid. Even if the Court holds § 27A unconstitutional, a retroactive application of H.R. 2443 or S. 1715 would still not necessarily be affected, because, unlike in Pacific Mutual, there is no final judgment here.

clear that separation of powers principles would prevent Congress from upsetting it. Although the Pacific Mutual case is likely to provide an authoritative answer, a key aspect of the judicial function is the application of law to the found facts of litigation. Congress, in adopting either H.R. 2443 or S. 1715, finds no facts, determines no payments. Congress in adopting either bill as law simply creates law.

To be sure, the law may be retroactive, but the circumstances triggering the need for legislation are the wrongful actions by New York that prompted the litigation. The Court's rule in Delaware v. New York, in giving a windfall to three of the 50 States, created the very unfairness that Congress redresses. In passing such a law Congress necessarily acts legislatively. It still would remain for the Special Master and the Court to exercise the judicial function: application of law to the facts of litigation.

There is no reason to think that the United States Supreme Court, when making federal common law, enjoys any more immunity from legislative scrutiny than does, say, the Wisconsin, Texas, or any other State supreme court. Does Professor Gibbons mean to suggest that we have returned to a version of Lochner v. New York, 198 U.S. 45 (1905), where the common law had truly become "constitutionalized" and immune from legislative override? For nothing less radical would provide even the slimmest basis for his argument. Instead, American constitutional law at least since 1937 has accepted the view that common-law courts and legislatures regularly engage in dialogue about matters of public policy. Often, of course, legislatures are more than happy to accept the judicial determination; on occasion, however, the legislature comes to a different conclusion. At least so long as the judicial determination was not constitutionally based, there is no serious argument that the legislature is estopped from deciding that a different policy in fact serves the public interest.

Professor Gibbons has cited no cases invalidating legislation that overturns a nonconstitutional Court decision, and as we have noted, we are aware of none. All this may be different after a final judgment issues because then the issues present before the Court in Pacific Mutual come into play. But until there is a final judgment (and depending then on the outcome of Pacific Mutual), separation of powers, like Due Process, is not offended by legislative action.

We also wish to note two further legislative considerations. First, even if New York and Delaware do acquire custody of the distributions, their custody remains subject to defeasance. Thus, if the true owners (now unidentifiable) can somehow be identified in the future, any escheated moneys must be turned over to them. Further, if the address of the true owner can be located, but the owner not found, then the State of that individual's address is entitled to the escheated dividends.

(This is the so-called primary escheat rule as opposed to the so-called secondary, or backup, rule that is at issue.) Second, the parties are States, not individuals, and the dispute is one of a national character -- as witnessed by the fact that all 50 States are involved. It therefore is, for all the reasons discussed, appropriate for Congressional resolution.

To conclude, we see no constitutional impediments whatsoever in Congress' powers to enact legislation dealing with interstate escheat both prospectively and retrospectively. We believe the Schooner Peggy and its almost two hundred years of progeny gives Congress power to enact retroactive rules prior to the entry of a final judgment. Finally, we think there is a strong argument that Congress could, if it deemed it necessary, upset even a final judgment, had one been entered. On this point, however, the issue is obviously unsettled, and awaits further clarification from the Supreme Court in Pacific Mutual.

SANFORD VICTOR LEVINSON

Born: June 17, 1941, Hendersonville, North Carolina

Personal data: Married to Cynthia Yenkin Levinson; two daughters, Meira and Rachel

Home address: 3410 Windsor Road
Austin, Texas 78703
512/477-6445

Office Address: University of Texas Law School
727 E. 26th Street
Austin, Texas 78705
512/471-3273 (direct dial)
fax: 512-471-6988
e-mail: svl@msmail.law.utexas.edu

Education: Duke University, B.A., 1962
Harvard University, Ph.D., 1969
Stanford Law School, J.D., 1973

Honors and Fellowships: Phi Beta Kappa
Woodrow Wilson Fellowship, 1962
Kent Fellowship, 1966
Russell Sage Fellowship, 1970
American Law Institute (elected to membership, 1986)

Admitted to Bar: California, 1973
United States Supreme Court, 1981

EMPLOYMENT AND PROFESSIONAL AFFILIATIONS

Professor, University of Texas Law School, January 1980
Charles Tilford McCormick Professor of Law, 1986-90; Angus G. Wynne Sr. Professor of Civil Jurisprudence, 1990-91; W. St. John Garwood and W. St. John Garwood, Jr. Regents Chair in Law, 1991-

Professor, University of Texas, Department of Government, 1985-

Associate, Shalom Hartman Center for Jewish Philosophy, Jerusalem, Israel, 1983-

Fellow, Program in Ethics and the Professions, Harvard University, 1991-92

Visiting Professor, Harvard Law School, Fall 1991

Faculty, seminar on "Raising Rights Consciousness," sponsored by Democracy After Communism, Hungary, June 1991, 1992

Professor, University of San Francisco Summer School at Trinity College, Dublin (Ireland), June 1987

Member, Institute for Advanced Study, Princeton, New Jersey, 1986-1987

Visiting Professor, Faculty of Law, Hebrew University in Jerusalem, October-December 1984

Assistant professor, Department of Politics, Princeton University, 1975-79

Visiting assistant professor, University of Texas Law School, Summer 1978

Staff attorney, Children's Defense Fund, Cambridge, Massachusetts, 1974-75

Law clerk to Honorable James B. McMillan, United States District Judge for the Western District of North Carolina, Charlotte, North Carolina, 1973-74

Research assistant to Professor Anthony G. Amsterdam, Stanford Law School, Summer 1972

Instructor and assistant professor, Department of Political Science, Ohio State University, 1968-70

Teaching Fellow, Harvard University, Department of Government, 1963-68, Committee on Social Studies, 1967-68

Summer associate, Tuskegee Institute, Tuskegee, Alabama, 1964

Summer intern, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 1963

Summer intern, National Aeronautics and Space Administration, 1962

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Briefed and argued New Jersey v. Schmid, 423 A.2d 615 (1981), appeal dismissed sub nom. Princeton University v. Schmid, 455 U.S. 100 (1982)(represented Schmid)

Prepared and submitted brief *amicus curiae* in behalf of a group of American law school teachers of professional responsibility in William Boyd Tucker v. Kemp (85-5496)

Vita

LUCAS A. POWE, JR.
Anne Green Regents Chair
The University of Texas
Autumn 1993

Born: 1943

B.A. Yale University 1965; Major - American History

J.D. University of Washington 1968
Honor Graduate in Law (#1 in Class)

Articles Editor, Washington Law Review 1967-68
Carkeek Prize for Outstanding Student Contribution to Washington Law Review

Law Clerk, Justice William O. Douglas, United States Supreme Court 1970-71

Member, Washington State Bar Association since 1968
Texas State Bar Association since 1980

Member, American Law Institute since 1985

Member Board of Review, The William O. Douglas Inquiry into the State of Individual Freedom 1977-1980

Consultant, Federal Communications Commission Commercial Network Inquiry 1979 and 1980

Reviewer, History Book Club since 1984

Member, American Civil Liberties Union Committee on Regulation of the Media 1988-90

Teaching Experience

Professor of Law, The University of Texas since 1974
Professor of Government, The University of Texas since 1988
Assistant Professor, University of British Columbia, 1968-70
Assistant Professor, The University of Texas, 1971-74
James R. Dougherty Chair for Faculty Excellence 1980-81 and 1987
Visiting Professor, University of North Carolina, Summer 1975
Visiting Professor, Georgetown University Law Center, 1977-78
Visiting Professor, University of Utah, Summer 1980
Visiting Professor, University of California at Berkeley, 1983-84
Visiting Professor, University of Connecticut, Fall 1986

Subjects Taught

Constitutional Law
First Amendment
Electronic Mass Media
Federal Courts
Equal Protection
McCarthyism
Energy Regulation
The Supreme Court and Public Policy

Publications

Books:

The Fourth Estate and the Constitution: Freedom of the Press in America (University of California Press 1991)

Book Club Selection:
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Honors: American Bar Association Certificate of Merit 1992
Scribes Book Award 1992
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WCZY, Cincinnati, OH, August 7, 1987 (talk show)
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STATEMENT OF RANDOLPH E. HOCK, Ph.D.
DIALOG INFORMATION SERVICES, INC.
ON H.R. 2443
BEFORE THE SUBCOMMITTEE ON
FINANCIAL INSTITUTIONS SUPERVISIONS, REGULATION
AND DEPOSIT INSURANCE
COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS
March 22, 1994

Mr. Chairman and Members of the Committee:

My name is Randolph E. Hock, and I am District Sales Director, Southeast District, for DIALOG Information Services, Inc., a leading online vendor of databases. DIALOG provides worldwide access to more than 400 databases, which contain, among other things, the full-text of more than 3,000 publications, bibliographic access to approximately 100,000 other serial publications, directory information, and a variety of current news sources. Included among these databases are the DISCLOSURE database (which contains detailed financial and textual information on public companies), SEC ONLINE (covering all New York and American Stock Exchange companies plus 2,000 NASDAQ companies), Standard and Poor's Daily News, and Knight-Ridder/ Tribune Business News. Databases such as these contain the information necessary to comply with the Equitable Escheatment Act, H.R. 2443, in a cost effective manner.

DIALOG Information Services, which has been in business for over 20 years, has more than 140,000 customers in 100 countries. Its customers include the majority, if not all, of the Fortune 500 companies, as well as tens of thousands of smaller companies and individuals. Among other markets, DIALOG is widely utilized by the securities and related industries. Leading investment banks and brokerage firms are among our largest customers.

Information on companies, from addresses to financial data and news, is included in a variety of databases available through the DIALOG service, including the DISCLOSURE database. "DISCLOSURE" provides information derived from reports filed with the U.S. Securities and Exchange Commission (SEC), including 10-K's, 20-F's, 10-Q's, 8-K's, 10-C's, and Proxy Statements. Financial information includes annual and quarterly balance sheets and income statements; annual financial ratios; cash flow statements; and weekly price earnings information. Textual information includes the full text of the management discussion; President's letters to shareholders; footnotes to the financials; listings of officers, directors, and subsidiaries; and citation to other corporate events and exhibits. DISCLOSURE also contains résumé information on each company, including its address, phone number, CUSIP number, Fortune and Forbes numbers, SIC codes, auditor, stock transfer agent, and legal counsel. The database is searchable by more than 140 different criteria, including company name, city, state of principal executive office, zip code, and CUSIP number.

The fundamental information banks and brokerage firms will need to obtain to comply with H.R. 2443 -- the location of the principal executive offices of issuers of securities, as identified by the issuers on their most recent SEC-required forms 10-Q or 10-K -- is included in the vast array of information maintained on the DISCLOSURE, and other, databases on DIALOG. Indeed, when the subscriber asks the database to identify the address of a company, the address will be the address identified by the company as its principal executive offices on the cover page of its most recent SEC filing.

The DISCLOSURE database is updated weekly. Even more current news about companies can be found in a variety of databases such as Standard and Poor's News, which is updated daily, and Knight-Ridder/Tribune Business News, which is updated approximately every fifteen minutes. In addition to this current information, there is a variety of historical, textual, and financial information available in other databases, such as the various news databases, with online coverage going back a number of years. The SEC ONLINE database contains detailed financial and textual information -- including the principal executive offices -- for public companies as far bask as 1987.

To obtain information from these databases, a subscriber uses its personal computer with a modem. The subscriber dials a number, usually local, or connects through the INTERNET to connect with the DIALOG computers. Searching is accomplished either through menus or a series of simple commands.

To subscribe, the typical start-up cost is $295, and there is an annual service fee of $75. The subscriber is charged based upon the amount of time connected and the amount of output taken (e.g., typed). For the DISCLOSURE database, the online charge is $.90 per minute, plus as little as $.10 per minute for telecommunications. Output charges range from $1.00 for just company name and address to $23.00 for the entire record, including text, financials, etc. Retrieving the name and principal executive offices of a company using the CUSIP number can be done for a single company for under $2.00/ If several companies are done at once the total cost can be as little as $1.10 per company.

As noted, DISCLOSURE, and other databases on DIALOG, contain the principal executive offices of issuers of securities. This information can easily be accessed to implement H.R. 2443. If a bank or brokerage firm needs to determine the location of the principal executive offices of the issuers of the securities on which particular owner-unknown unclaimed securities distributions were paid, it can do so through simple database searches (by company name or CUSIP number) as described above. The DISCLOSURE Database contains the unique CUSIP number for each of the companies covered.

If the principal executive office of a large number of issuers is sought, an efficient and even more cost-effective manner of conducting such searches would be through a computer link between a list of the issuers (and/or their CUSIP numbers) and a database. The search would be done automatically without having to "re-key" the company name or CUSIP number. The principal executive office data could be received in electronic form, which would allow the data to be immediately used by the firm's own spreadsheet or database program.

Alternatively, the principal executive offices of all the companies on the database can be downloaded and placed on a disc that can be used by banks or brokerage firms. The information could then be updated periodically using the "ALERT" feature of the DIALOG system. ALERT automatically notifies a subscriber of every change in companies' principal executive offices.

A bank or brokerage firm could acquire all the principal executive office information contained in a database through another method: obtaining a compact disc of the database itself. The owner of such compact disc does not, of course, have to pay for searches. Since databases such as DISCLOSURE are already used by the securities industry for a variety of needs, the purchase price of the compact disc in large measure would be offset by savings on searches unrelated to H.R. 2443.

In conclusion, the databases provided through DIALOG Information Services, Inc., and by other vendors, makes the principal executive office information needed to implement H.R. 2443 readily accessible at minimal cost. Moreover, we would look forward to working with banks and brokerage firms to explore ways by which their compliance requirements can be simplified even further.

This statement applies equally to S. 1715.

Thank you.

STATEMENT OF NELSON S. KIBLER SUBMITTED TO THE FINANCIAL INSTITUTIONS SUPERVISION, REGULATION, AND DEPOSIT INSURANCE SUBCOMMITTEE OF THE HOUSE BANKING COMMITTEE CONCERNING H.R. 2443, THE EQUITABLE ESCHEATMENT ACT OF 1993

MARCH 22, 1994

Mr. Chairman and members of the Subcommittee, I submit this statement to address the handling of unclaimed securities distributions held by financial institutions such as brokers, banks and trust companies. As I will explain in this statement, my knowledge of the back office operations of securities firms, with which I have had extensive experience for some thirty years, leads me to conclude that this legislation would be significantly burdensome and very difficult (indeed, if records do not exist, impossible) to comply with, and thus may have costs to securities firms which could well outweigh the benefits, if any, from redistributing the funds. This would be true not only now but also in the future, when, as more fully explained on pages 17-20 below, the revenues to the states are likely to decrease and the costs of compliance per unclaimed distribution will likely increase.

I have spent my career as a lawyer and a public accountant understanding and improving the back-office practices of the securities industry to help them comply with rules designed to protect the investing public. In 1966, I became a member of the staff of the Securities and Exchange Commission (Commission), where from 1975 until my departure from the SEC in 1982, I held the position of Assistant Director of the Division of Market Regulation, one of the most senior non-political posts in the Division. I was one of the senior staff members directly responsible for the development and implementation of the SEC's financial responsibility programs for broker/dealers. These programs grew out of the back-office crisis of the late 1960s, during which inattention to sound back-office practices during a time of rapidly increasing volume contributed to serious capital deficiencies at some firms, resulting in the failure of a number of brokerage firms and a general loss of market confidence.

Since 1982, I have been an Accounting and Auditing Partner in the Financial Services Industry Group of Deloitte & Touche and its predecessor, Touche Ross & Co. In addition to participating in the Firm's work as independent public auditor of many of the largest public brokerage firms in the industry, I have taken on a number of special assignments. For example, in 1986, after the public scandal surrounding E.F. Hutton's banking practices, I was selected by that firm and approved by the Commission to examine that firm's practices and policies for the handling of customer funds; my report was made available to the public.

Both in my years on the staff at the Commission and in my years at Deloitte & Touche, I have been in contact with hundreds of brokerage and other financial service firms, as well as self-regulatory organizations and industry study groups. It is against that background of experience that I offer my statement today.

I want to emphasize three key points that may be lost at times in the debate over this issue. As I explain in more detail later in my statement:

(1) The funds at issue in H.R. 2443 are <u>not</u> money owed to individual customers of brokerage firms or individual shareholders, since they have already been paid. They have received all of the money owed them when the type of problem occurs that results in owner/address unknown unclaimed securities distributions.

(2) As I understand the legislation, it does <u>not</u> concern the vast majority of unclaimed property in which the broker or other financial institution has a last known address for a customer who fails to claim funds being held by the broker or other institution. Those unclaimed funds already escheat to the state of the proper owner's last-known address, and H.R. 2443 would not alter that rule.

(3) The legislation seems to be based in part on the premise that the issuer or the individual customer

has the best claim to the funds at issue. In fact, the funds are likely owed in most instances to financial institutions headquartered and/or incorporated in the financial-center states, the very states that I understand have the right to escheat the funds in question under current legal standards.

<u>How There Comes To Be "Owner-Unknown" Unclaimed Property Held By Financial Institutions -- The Subject of H.R. 2443</u>

The proposed legislation concerns a narrow class of unclaimed dividends, interest, and other distributions made by issuers of securities. The unclaimed property at issue here arises because securities are often held by persons, usually financial institutions, other than the beneficial owner, for a variety of reasons, some of which I will describe momentarily. The holders include brokerage firms, banks, and trust companies. The legislation addresses funds that come into the hands of these holders and are owed by them to persons that they cannot identify, generally because of errors, transfer delays, or imperfections in the systems maintained by the depositories, brokers and banks. This is commonly referred to as "owner-unknown" property.

The legislation *does not* concern the much larger universe of unclaimed property owed to identified, but "lost," persons, such as customers who have moved and provided no forwarding address. Under current law and practice, if such customer accounts cannot be reunited with their identifiable owners, the financial institution remits the contents of the account to the state of the customer's last-known address. According to one estimate by the staff of the SEC, this kind of unclaimed property totals some $10 billion. As I understand it, H.R. 2443 would not affect the treatment of these accounts.

Thus, it is important to recognize that owner-unknown property is <u>not</u> unclaimed because individual customers have lost touch with their banks or brokers. Owner-unknown property exists because of systemic recordkeeping problems historically faced by the back offices of firms in the securities industry over the years -- primarily in connection with the practice of holding physical certificates registered in the name of the holding institution but held on behalf of another. The practice of holding securities in the name of someone other than the beneficial owner has become known as holding securities in "street name" or "nominee name," and was already well-established at the time of the enactment of the Securities Act of 1933.

The practice of holding securities in "nominee name" or "street name" was developed to serve a number of vital functions in the securities industry. Most important, it was indispensable for the efficient transfer of securities among brokers by taking certificated securities out of the names and safe deposit boxes of individual investors and putting them in the name and custody of a broker/dealer. The practice provided a pool of fungible securities that could be delivered in satisfaction of daily settlement obligations without requiring the time and expense of re-registration. To effect delivery of securities in settlement of transactions, members of the securities industry were merely required to make physical delivery of street-name certificates, which were and remain freely negotiable and pass by delivery among brokers, banks, institutional investors and others in the securities industry (and are said to be in "good delivery" form) if properly endorsed by the firm in whose name they are registered or accompanied by a properly executed stock power.

The practice of delivering securities in street-name form and more recently through book-entry delivery has grown to be indispensable for the smooth functioning of the trading of securities. Nonetheless, it has meant that in a small percentage of cases, the funds do not reach the proper holder of securities: the Supreme Court decision in the Delaware v. New York case states that the unclaimed funds represent less than 0.02% of the total dividends and interest handled.

A principal case in which this problem could arise is where street-name certificates are delivered but are not re-registered in the new owner's name prior to a "record date" -- the date on which a company identifies the owners of its stock for purposes of payment of a dividend or other distribution. When that happens, the registered holder of record will receive the distribution, even though it is no longer entitled to the distribution because it no longer owns the stock. These distributions are typically referred to as "overages." Under longstanding and uniform custom and practice in the securities industry, the registered holder (generally a broker) will pay the dividend or interest to whoever can demonstrate that he held the physical certificate over the record date.

However, there are instances when the institution that held the physical certificate on the record date, and was therefore entitled to the distribution, cannot or does not contact the institution that actually received the distribution. In my experience, this has been a major source of the funds that become owner-unknown property, which, under established legal standards, must eventually be remitted to the state of incorporation of the institution holding the property.

In the late 1960s, the rate of instances of unclaimed securities distributions grew to unacceptable levels and was one factor that contributed to the back-office crisis that I mentioned earlier. Necessity required a more effective means for industry members to control the custody of securities and settlement of transactions and resulted in the development and expansion of securities depositories, primarily the Depository Trust Company. Depositories permit what is called the "immobilization" of securities. Paper certificates representing shares held in a depository do not have to change hands physically. Instead, they can be transferred or pledged among depository participants simply by entry on the depository's books. Handling of settlement through depositories has also been aided enormously by the work of the American Bankers Association's CUSIP (Committee on Uniform Securities Identification Procedures), which assigns a unique nine-digit number to almost every class of securities issued, so as to make uniform identification by computer possible. The immobilization of stock certificates in depositories means that few owner-unknown distributions occur involving securities "immobilized" in depositories.

In the late 1960s and early 1970s, I observed that owner-unknown property can also result from bookkeeping and data-entry errors (known as "breaks") on the part of a broker or on the part of persons paying the broker. For example, a broker may miscount the physical securities certificates in its vault or there may be an error in the records of the transfer agents, registrars or dividend disbursing agents. Any one of these errors or other bookkeeping inefficiencies (or a combination of them) can also lead to owner-unknown securities distributions.

In my experience, this phenomenon does <u>not</u> adversely affect the receipt of dividends and other distributions by the brokers' customers. It is standard practice in the industry for brokers to pay <u>all</u> dividend and interest payments due to customers on the payment date <u>regardless</u> of whether the broker receives the correct amount of the dividend or interest payment due on the payment date. Thus, in general, the unclaimed money to be escheated does not come out of individual customers' pockets. Instead, it is money that is owed to others in the securities industry, primarily located in the financial-center states.

I believe that over the years, the immobilization of certificates in depositories and improvements in recordkeeping have dramatically decreased the proportion of interest and dividends that falls into this category of unclaimed property every year. However, for reasons

I will discuss later, this problem will never disappear completely.

H.R. 2443 Would Create A Significant Burden On Financial Institutions To Track And Comply With The Laws Of Every State

Under current law, compliance with the requirements relating to owner-address unknown property is relatively simple and inexpensive for the institution holding the assets. A financial institution knows which single state's laws with which it must comply in handling this relatively small amount of unclaimed property -- namely, the laws of its state of incorporation. In my view, systems are in place so that firms can easily identify and comply with the relevant period of time that must pass before the property must be reported -- called the "dormancy period" -- and the other reporting requirements. Compliance can be handled quickly and at relatively low cost.

Similarly, when a firm seeks reimbursement for its unclaimed property, the institution knows where to go to assert the claim. Claims are made to a single state by following a familiar set of procedures. The institution need be alert only for what have been occasional changes in the relevant law in a single state.[1]

All of that would change if H.R. 2443 were to become law. Under H.R. 2443 as I understand it, it would fall to each financial institution to remit owner-unknown property to many different states, unrelated to where it was incorporated or where it had customers, but based instead on the location of the *issuer's* principal executive office. Every financial institution, no matter how small it might be and no matter how limited the number of states in which it has offices or customers, would have to undertake a complex process involving identification, tracking, and reconciliation of the laws of all states. It appears that firms would have to:

- develop and maintain an understanding of the escheat rules and procedures of each of the fifty states and the District of Columbia;
- systematically monitor the laws and legal interpretations in every state to comply with any changes in the law;
- reconcile any conflicts among the various state laws;

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[1] Of course, as I indicated earlier in my statement, financial institutions also remit properties to other states when the owner is identifiable and the institution has a last-known address for the owner, but this activity is, by definition, limited only to states in which the financial institutions have customers and thus are already complying with state laws and regulations.

- be subject to audit by each state, separately, over tens of thousands of items every year; and
- verify, many times a year, where thousands of corporations maintain their principal executive offices.

Moreover, I understand that under H.R. 2443, financial institutions, whatever their size, would face exposure to the assessment of penalties by all of the states.

Under H.R. 2443, every prudent financial institution would have to identify the principal executive office of every issuer in the country. Because this information can change continually, the list would have to be updated with the receipt of every dividend or other distribution. Although there are private firms that provide information on principal executive office locations, there are often conflicts among the data, due to, among other things, location changes of principal executive offices as well as due to human error. As a result, in my judgment, a quality-control program would have to be designed, under which administrative personnel would reconcile the discrepancies by looking at actual SEC or other regulatory agency filings, which H.R. 2443 designates as the legally relevant sources from which an issuer's office location is to be identified. Indeed, because of this statutory mandate, it would probably be prudent for institutions to develop a method for tracking regulatory agency filings to identify the locations of the principal executive offices of all issuers.

But it appears to me that the requirements are even more complicated and burdensome under H.R. 2443's regime. H.R. 2443 requires the holder of owner-address unknown property to identify years after the fact the location of the principal executive offices of an issuer as it existed at the time the payment was made to the holder. Since the dormancy period can be as long as seven years, financial institutions throughout the nation would be required by H.R. 2443 not only to construct current data on the location of principal executive offices, but would be required to figure out a way to reconstruct that information for periods going back seven years. In my experience, these systems do not exist today in the industry.

Even then the financial institution's task under H.R. 2443 would not be complete. In my view, a program would also have to be developed to match the items in an institution's unclaimed property records against information on the rules and procedures for each state. This would first require mastery of the various reporting requirements of each of the fifty States and the District of Columbia. A firm would have to ascertain the dormancy period for each jurisdiction as well as find out whether a law had been enacted requiring remittance based on the new rule, a requirement of H.R. 2443. The flux in the relevant state law means that nationwide surveys would have to be performed and updated regularly. Because each state has a different date during the year on which its unclaimed property report comes due, a firm would have to set up a calendaring system, so that it could compare the items held in its account against the various relevant data in sufficient time for a report for the relevant state to be prepared.

The firm also would have to contact each state's unclaimed property office to acquire and maintain current copies of the relevant forms. Some states accept computerized data, but many still require forms filled out by hand or typewriter. Computer programs would have to be designed to match the various data requirements of the various states that accept computerized data; and each firm would have to train personnel on the requirements of the states that do not accept computerized data.

Once all of this was set up, each firm would have to dedicate substantial resources to compliance on an ongoing basis. With fifty-one jurisdictions to report to, there would be a constant cycle of data acquisition and correction, matching to the unclaimed property account, culling out of nondormant items, and preparing reports. It would appear to me that each firm would need non-clerical personnel to make judgments about discrepancies, and to assure that the reporting requirements were met. In addition, each firm would have to stay abreast of which states require reports under the new standard, changes in each state's applicable dormancy periods, and changes in each state's reporting requirements.

Each firm would also have to incur the expense of responding to audits from any or all states. Under H.R. 2443, regulators from every state would be entitled to visit each and every financial institution in the country to demand access to records in order to establish a state's "fair share" of the owner-unknown funds.

Moreover, it would appear to me that the process of making claims on behalf of the firm or its customers would be as complicated and cumbersome as the remittance process itself. Under current law, each firm submits claims to a single state. Under H.R. 2443, firms would have to maintain a historical database tracking each remitted item, so that if a claimant later came forward, the firm could identify the appropriate state in which to proceed. Firms would have to submit claims in fifty-one different jurisdictions, with varying rules and procedures for making claims.

The existing systems -- computerized or not -- will not resolve the complexity of these problems. First, computerization does not change the fact that firms would have to devote human resources to track and then comply with the numerous technical and legal requirements in each of the fifty-one jurisdictions. Second, the process of tracking these obligations by computer will be extremely difficult, if not impossible, without CUSIP numbers assigned to the underlying securities, and there is a large volume of securities that have no CUSIP numbers. See SEC, Final Rule on Securities Transactions Settlement, 58 F.R. 52,891, 52,899 & n.54 (Oct. 13, 1993) (observing that there are probably several thousand municipal issues [many of which have identical-sounding names] without CUSIP numbers). These thousands of issues would have to be handled manually, at what is sure to be substantial cost.

Reconstructing Records In Order To Support Retroactive Application Of H.R. 2443's New Standard Would Likely Create An Impossible, And Certainly An Inequitable, Burden For Firms That Have Complied Fully With All Previously Applicable Legal Requirements

H.R. 2443 is fully retroactive, and financial institutions would be expected under the bill to help sort out the competing claims of the fifty States and the District of Columbia not only in the future but, as

I understand the statute, also going back as far as records can be found. It would appear to me that firms that have remitted funds under well-settled rules would be exposed to a host of new claims from the various states. They would be subjected to audits, demands for old records, and potential claims for interest and penalties from all of the claiming states. The firms would be expected to trace each of what could be millions of items of unclaimed distributions to its original issuer, the location of whose principal executive office at a point in the past would have to be somehow determined. Based on my extensive knowledge of the back-office operations of these firms, it is my opinion that compliance with these requirements would be extremely complex, costly, and time consuming. Compliance would be expensive, disrupt normal operations, and would be a very heavy burden indeed.

<u>In the Future, the Net Benefit, if Any, to States Will Likely Decrease and the Cost of Compliance Per Item Increase</u>.

In the near future, we can expect that any revenues to states would *decrease*, as the industry continues to reduce the proportion of unclaimed distributions, which I believe will occur for the reasons I explain below. At the same time, the cost of compliance per unclaimed distribution would *increase*, because the proportion of unclaimed property that would have to be processed manually will increase, as discussed later.

As I mentioned earlier in my statement, it would appear that the immobilization of certificates through the use of central depositories and computerized settlement mechanisms has substantially decreased the proportion of owner-address unknown property. Recent and proposed changes in industry rules will lead to increased immobilization of certificates and thus further decrease the proportion of owner-unknown payments. For example, New York Stock Exchange Rule 412 requires brokers to use an automated transfer system when transferring a customer account from one broker to another, eliminating one source of error that resulted in the past in owner-unknown distributions.

Another proposed systemic change could further decrease -- indeed, may well eliminate -- the phenomenon in garden-variety transactions. The national securities markets -- NYSE, AMEX and NASDAQ -- are expected in the near future to propose a rule to the SEC that would make it a condition of listing that the security be eligible for deposit into a depository company and thus immobilized.[2] Increasingly, then, commonly-traded

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[2] See SEC, Final Rule on Securities Transactions Settlement, 58 F.R. 52,891, 52,896 (Oct. 13, 1993).

securities will be immobilized, and only the unusual items, ones not listed on the national markets, would have the potential to produce this type of unclaimed property.

Similar steps have been taken by the Municipal Securities Regulatory Board with regard to municipal securities. Proposed rules will require automated clearance and settlement on most institutional and inter-dealer transactions.

Thus, one significant cause of owner-unknown securities distributions -- delivery of paper securities certificates to institutional customers, banks and brokers -- will be reduced in magnitude for the most widely traded securities. Only the "exceptions" will remain to create property subject to H.R. 2443, such as unlisted limited partnership interests, mortgage-backed securities issued by government-sponsored enterprises, and mortgage pass-throughs. These instruments at present do not fit neatly into the depository system, and will therefore continue to result in paper transactions and unclaimed property.

In short, increased immobilization and computerization now on the immediate horizon should result in a dramatic decrease in the typical unclaimed securities distribution. At the same time, I believe it is safe to predict that owner-unknown distributions will not disappear completely, because difficult-to-handle items, which require paper records to track, will continue to be traded. When it comes time to escheat these items, they will need to be handled manually.

<u>H.R. 2443 Is Based On A Misconception Of Owner-Address Unknown Property</u>

I feel that there is a misconception permeating the discussion surrounding H.R. 2443. I understand that proponents say "send the money back where it came from," as if the money were the issuers' or that the customers had the best claim to the money. But as I will explain, I believe that financial institutions are the probable owners of the money, not the "lost" customers or the issuers.

As I explained earlier, it is the practice in the industry for a broker to pay all its customers what they are owed for a distribution <u>regardless</u> of whether the broker actually received the full distribution. It would simply be bad business to follow any other practice. Thus, the money at issue here is not coming out of the pocket of a broker's individual customer.

Nor does the issuer have a claim to this money, as I understand it, because the issuer of a dividend has no interest in it once the record-holder (for example a broker) has been paid. When an issuer pays the record-holder, its duty is discharged. Accordingly, the rightful recipient of the dividend or distribution has no recourse against the issuer, but must, as I understand the Supreme Court's ruling in Delaware v. New York, look to the firm in whose name the securities were registered to assert a claim for unpaid dividends or interest.

Most importantly from my experience, because of the nature of the transactions that cause these owner-unknown distributions to occur, the rightful owner is usually a financial institution that has not claimed the dividend from another broker/dealer. In this regard, an examination of a sample of the claims paid by New York since 1985 reveals that 96% of the claimants representing 99% of the dollars claimed were financial institutions, and of those financial institutions, 90% (representing 86% of the dollars claimed) were either headquartered or incorporated in New York, Massachusetts, or Delaware.

Conclusion

In my opinion, H.R. 2443 would be significantly burdensome and very difficult to comply with. Indeed, if records do not exist, compliance with the retroactivity provisions will be impossible. The benefits, if any, to the states would only decrease in the future, while, in my opinion, compliance costs would increase. And, from my perspective in considering the effects of implementation of this legislation, the bill will have a significant negative impact on members of the securities industry, who will bear the costs associated with remitting these funds and filing claims.

STATE OF WYOMING
OFFICE OF THE GOVERNOR
CHEYENNE 82002

MIKE SULLIVAN
GOVERNOR

January 26, 1994

The Honorable Craig Thomas
U.S. Representative
1631 Longworth Bldg.
Washington, D.C. 20515

RE: H.R. 2443, The Equitable Escheatment Act

Dear Craig:

As you know, hearings on H.R. 2443 are scheduled for February 1, 1994 before the Subcommittee on Financial Institutions Supervision, Regulation and Deposit Insurance. I am writing to urge you to support the bill as introduced when the Subcommittee caucuses after the hearing. I understand some members on the Subcommittee are concerned that doing so would require New York to disgorge monies it seized over the past 20 years from banks and brokerage firms, and that this somehow would be unfair.

Nothing is farther from the truth. The Supreme Court held New York must disgorge the funds it wrongfully seized, and the Special Master carefully considered and rejected New York's fairness arguments. He noted New York's purported "hardship represents a calculated risk New York has imposed on itself, and not an unjust surprise or unfair burden." The question, then, is not whether New York must disgorge, but to which states, to Delaware and Massachusetts alone, or to all states on a fair and equitable basis.

On January 21, 1994, New York settled its litigation with Delaware, and will pay Delaware $200 million. This represents a windfall of $800 for each Delaware household. If New York is willing to pay the smallest State in the Union $200 million, surely it is not unfair for New York to pay a reasonable settlement amount to Wyoming.

If New York and Delaware sense the Subcommittee may not support requiring New York to disgorge the monies it seized, however, they will not make a meaningful settlement proposal to our state. Stating your intention at the caucus to support the bill as introduced will provide us with the greatest leverage in any settlement discussions. Eliminating the requirement that New York disgorge to all states, and not just to Delaware, will have the opposite effect and, indeed, may defeat settlement entirely. Only the certainty of swift and decisive legislative action will assure our state is treated fairly, whether by settlement with Delaware and New York under the threat of imminent legislation as introduced, or by enactment of the legislation itself.

Please convey your support of H.R. 2443 as introduced to Subcommittee Chairman Stephen L. Neal, and advise him it is appropriate for all states -- not just Delaware -- to be treated fairly.

With best regards, I am

Very truly yours,

Mike Sullivan
Governor

ISBN 0-16-044545-0
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